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Ngan Siong Hing v RHB Bank Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO A-02–1536 OF 2011
ABDUL WAHAB PATAIL, HAMID SULTAN AND VARGHESE GEORGE JJCA
13 JANUARY 2014

C

Contract — Breach — Retainer — Breach of retainer — Bank's instructions to law firm to prepare loan security documents in respect of facilities it had granted to borrower/purchaser of properties — Whether firm in breach of terms of retainer — Whether retainer specifically required firm to liaise with developer's solicitors — Whether firm had discharged its duty according to law and/or conveyancing practice — Whether dominant cause for bank's losses was breach or failure of firm to contact developer or developer's solicitors — Whether trial judge misdirected himself on issue of liability

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Tort — Negligence — Professional negligence — Duty of care — Law firm instructed to act for bank — Whether firm failed to discharge duty of care it owed to bank — Whether firm failed to exercise skill required of prudent conveyancing solicitor — Whether there was specific requirement in law or practice in year 2000 to do search on solicitors — Causation — 'But-for' test — Whether direct cause of loss suffered by bank was firm's failure to comply with specific instructions of bank — Volenti non fit injuria — Whether doctrine would exonerate firm of liability — Whether trial judge misdirected himself on issue of liability

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The respondent bank ('bank') had approved two housing loans to a borrower in relation to the sale and purchase of two apartment units ('the properties') by the borrower from a vendor, who claimed to be the first-original purchaser of the apartments from a proprietor and developer. In the circumstances, the sale and purchase transaction between the borrower or second purchaser and the vendor was a subsale and the bank was the financier of this subsale. By way of a letter of instruction or retainer dated 18 October 2000 ('the LOI'), the bank had appointed and instructed the legal firm of Abbas & Ngan ('the firm'), to prepare the loan security documents in respect of the facilities granted to the borrower. Upon receiving confirmation from the firm that their interest was 'adequately protected', the bank released the loan sum, which was made out in favour of the vendor but forwarded to the firm for onward transmission. When the borrower defaulted in the repayment of the bank's facilities, the bank discovered that the borrower had a fictitious identity; that the vendor was never the beneficial owner of the properties; and that the solicitor who had witnessed the sale and purchase agreement and who was acting for the borrower or second

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purchaser was a bogus legal firm. The bank then commenced legal proceedings against the partners of the firm for losses and damages suffered by it as a result of the firm's breach of contractual obligations, which included, inter alia, failing to carry out the necessary searches on the alleged vendor, proprietor, developer and borrower/purchaser; and alternatively in the tort of negligence for its failure to discharge the duty of care it owed to the bank. It was the bank's case that the firm had failed to make relevant enquiries, which would have revealed that the sale and purchase agreements forming the chain of title were forgeries, and that it had failed to exercise the skill required of a prudent conveyancing solicitor. The trial judge found that the foundation of the respondent's claim in contract and/or tort was the LOI and that the respondent had proven its case against the partners of the firm. The trial judge thus allowed the bank's claim. The surviving partner of the firm ('the appellant') has filed the present appeal. The appellant argued that trial judge had erred when he held that the LOI, which was general and vague, was in the nature of a 'specific instruction'. The appellant also submitted that the loss suffered by the bank was caused by extraneous or intervening factors, such as the fraud by the borrower, which went beyond the control of both parties and that as such the firm ought not to be made liable for the same. The appellant's grounds of appeal were anchored on two legal maxims, namely *volenti non fit injuria* and *ex turpi causa non oritur action*. The respondent responded that though the LOI was couched widely, there was a specific direction for the firm to liaise with the developer's solicitors, which in any event was the conveyancing practice in respect of properties where no separate strata title had been issued. The respondent further submitted that even if the loss suffered by it could be attributed to two or more causes, the material or effective cause for the loss was the firm's failure or omission to contact the developer or developer's solicitor.

Held, allowing the appeal with costs:

(1) (per **Hamid Sultan JCA**) The real issue in the present case was whether the appellant had discharged his duty according to law and/or the conveyancing practice and not whether the legal maxim *volenti non fit injuria*, which in essence means harm suffered by consent is not actionable, would exonerate him. In the instant case, the respondent bank or appellant had not consented to the injury. The injury was a result of fraud committed on the bank as well as the appellant. The second doctrine relied upon by the appellant, namely *ex turpi causa non oritur action* would also not absolutely exonerate the appellant from liability (see paras 23–24).

(2) (per **Hamid Sultan JCA**) The duty of care and breach complained of by the bank in the present case related to the professional conduct of the appellant. Thus the opinion of the expert of the profession played a major role in determining the issue according to their professional standards or obligations. Further, the instructions in the LOI relied upon by the

respondent bank to support its claim against the appellant were vague and therefore the nature of the searches to be ordinarily carried out by the firm would largely depend on conveyancing practice. In consequence the evidence of the experts would need to be considered to ascertain liability (see para 29).

(3) (per **Hamid Sultan JCA**) The respondent's argument that the firm's failure or omission to do a search on the developer's solicitor was the material cause for the respondent's loss in contract and negligence was not its pleaded case or specified in the instruction. Again this issue was one relating to conveyancing practice as was in vogue in the year 2000. The experts who gave evidence did not say that it was a requirement to do a search on solicitors in the year 2000. Although English conveyancing practice required a search to be done on solicitors to avert conveyancing fraud, the English standards could not be imposed in Malaysia on a transaction, which took place in the year 2000 and that too in cases where there was no specific requirement in law or practice or by way of cliental instruction to do so. In the circumstances, the trial judge had erred when he found liability against the appellant when there was no specific issue on related issues, especially when the LOI and pleadings were vague (see paras 68–70).

(4) (per **Hamid Sultan JCA**) In addition, the trial judge had failed to deal with the issue of causation in the right perspective and failed to appreciate the test as to whether it was just on the facts to hold the appellant liable. The basic test for establishing causation was the 'but for' test in which the defendant would be liable only if the claimant's damage would not have accrued but for his negligence. Based on the evidence adduced in the present case, it was clear that the appellant was not the proximate or direct cause of the loss or the loss was not foreseeable or probable. As such, the appellant was not liable in contract or negligence and the trial judge had misdirected himself on the issue of liability (see para 37).

(5) (per **Varghese George JCA**, dissenting) It was undeniable that there was an express and specific instruction by the respondent bank to the firm to liaise with the developer's solicitor amongst other parties. From the contents of the LOI, the only waiver by the bank was as to the lodgment of any private caveat on the properties. Given that no separate individual titles to the properties had as yet been issued, the source of the 'title' to the properties was the developer. This was the reason why the instruction to liaise with the developer's solicitors and obtain the original sale and purchase agreement were included in the LOI. Further, the bank's instructions did not give rise to any ambiguity, vagueness or confusion. As such, the trial judge was not in error to have concluded that there were specific instructions for the bank to liaise with the developer's solicitor in

order to verify the basis and propriety of the transaction claimed by the vendor as purchaser of the properties from the developer (see paras 73–75 & 79).

(6) (per **Varghese George JCA**, dissenting) Further, the bank's action brought against the firm was not merely in contract for breach of the retainer but also in the tort of negligence as well. This clearly required the firm to discharge its duty of care owed to the bank with reasonable skill and professionalism to protect the bank's interest to ensure the efficacy of the security documentation. Applying the 'but for' test in the particular circumstances of this case, the direct cause of the loss suffered by the bank was the firm's lapse or failure to comply with the specific instruction of the bank to carry out searches on the developer and/or liaise with the developer's solicitor. The trial judge was therefore not in error on the facts or in law in allowing the bank's claim against the firm (see paras 96 & 102).

[Bahasa Malaysia summary

Responden bank ('bank') telah meluluskan dua pinjaman perumahan kepada peminjam berkaitan jual beli dua buah unit apartmen ('hartanah tersebut') oleh peminjam daripada penjual, yang mendakwa dia adalah pembeli asal pertama apartmen-apartmen daripada tuanpunya dan pemaju. Dalam keadaan itu, transaksi jual beli antara peminjam atau pembeli kedua dan penjual adalah satu subjualan dan bank adalah pembiaya subjualan ini. Melalui surat arahan atau retainer bertarikh 18 Oktober 2000 ('SA tersebut'), bank telah melantik dan mengarahkan firma guaman Abbas & Ngan ('firma tersebut'), untuk menyediakan dokumen-dokumen jaminan pinjaman berkaitan kemudahan yang diberikan kepada peminjam. Setelah menerima pengesahan daripada firma tersebut bahawa kepentingan mereka telah 'adequately protected', bank melepaskan jumlah pinjaman, yang dibuat bagi pihak penjual tetapi dikemukakan kepada firma tersebut untuk transaksi seterusnya. Apabila peminjam gagal membuat pembayaran balik kemudahan bank, bank tersebut mendapati bahawa peminjam mempunyai pengenalan diri palsu; bahawa penjual tidak pernah menjadi pemilik benefisiari untuk hartanah tersebut; dan bahawa peguamcara yang menjadi saksi perjanjian jual beli itu dan yang bertindak bagi pihak peminjam atau pembeli kedua adalah firma guaman palsu. Bank tersebut telah memulakan prosiding undang-undang terhadap rakan kongsi firma tersebut untuk kehilangan dan kerugian yang dialamiya akibat pelanggaran tanggungjawab kontraktual firma tersebut, termasuklah, antara lain, gagal menjalankan carian yang perlu ke atas penjual, tuan punya, pemaju dan peminjam/pembeli yang dikatakan itu; dan secara alternatif dalam tort berhubung kecuaian kerana kegagalannya melaksanakan kewajipan berhati-hatinya ke atas bank tersebut. Adalah kes bank tersebut bahawa firma tersebut telah gagal membuat siasatan yang berkaitan, yang dapat menunjukkan bahawa perjanjian jual beli itu membentuk rantaian hak milik

yang palsu, dan bahawa ia telah gagal melaksanakan kepakaran yang diperlukan sebagai peguamcara pindah hak yang berhemat. Hakim perbicaraan mendapati asas tuntutan responden dalam kontrak dan/atau tort adalah SA tersebut dan bahawa responden telah membuktikan kesnya terhadap rakan-rakan kongsi firma tersebut. Hakim perbicaraan dengan itu membenarkan tuntutan bank tersebut. Rakan kongsi yang kekal dalam firma tersebut ('perayu') telah memfailkan rayuan ini. Perayu berhujah bahawa hakim perbicaraan terkhilaf apabila beliau memutuskan bahawa SA tersebut, yang am dan tidak jelas, adalah bersifat 'specific instruction'. Perayu juga berhujah bahawa kehilangan yang dialami oleh bank tersebut disebabkan oleh faktor-faktor yang tidak berkaitan atau mencelah, seperti fraud oleh peminjam, yang di luar kawalan kedua-dua pihak dan oleh itu firma tersebut tidak patut dipertanggungjawabkan. Alasan rayuan perayu berasaskan dua maxim, iaitu *volenti non fit injuria* dan tindakan *ex turpi causa non oritur*. Responden menjawab meskipun SA tersebut bersifat umum, terdapat arahan spesifik untuk firma tersebut berhubung dengan peguamcara pemaju, yang mana dalam apa keadaan adalah amalan pindah hak berkaitan hartanah di mana tiada hak milik strata berasingan telah dikeluarkan. Selanjutnya responden berhujah meskipun kehilangan yang dialami olehnya mungkin diakibatkan oleh dua sebab, sebab utama atau efektif untuk kehilangan itu adalah kerana kegagalan atau peninggalan firma tersebut menghubungi pemaju atau peguamcara pemaju.

Diputuskan, membenarkan rayuan dengan kos:

(1) (oleh **Hamid Sultan HMR**) Isu sebenar dalam kes ini adalah sama ada perayu telah melaksanakan kewajipannya menurut undang-undang dan/atau amalan pindah hak dan bukan sama ada maxim perundangan *volenti non fit injuria*, yang bermaksud kecederaan yang dialami dengan persetujuan tidak boleh diambil tindakan, akan melepaskannya. Dalam kes ini, responden bank atau perayu tidak menyetujui kecederaan itu. Kecederaan itu diakibatkan fraud yang dilakukan ke atas bank tersebut dan juga perayu. Doktrin kedua yang digunakan oleh perayu iaitu tindakan *ex turpi causa non oritur* juga tidak akan melepaskan perayu daripada liabiliti sepenuhnya (lihat perenggan 23–24).

(2) (oleh **Hamid Sultan HMR**) Kewajian berjaga-jaga dan pelanggaran yang diadukan oleh bank tersebut dalam kes ini berkaitan dengan tingkah laku profesional perayu. Oleh itu pendapat pakar tentang profesion itu memainkan peranan penting dalam menentukan isu menurut piawai atau tanggungjawab profesional mereka. Selanjutnya, arahan dalam SA tersebut yang digunakan oleh responden bank untuk menyokong tuntutannya terhadap perayu adalah tidak jelas dan oleh itu sifat carian yang biasanya dilakukan oleh firma tersebut amat bergantung kepada amalan pindah hak. Akibat daripada itu keterangan pakar perlu dipertimbangkan untuk menentukan liabiliti (lihat perenggan 29).

(3) (oleh **Hamid Sultan HMR**) Hujah responden bahawa kegagalan atau peninggalan firma tersebut untuk membuat carian ke atas peguamcara pemaju adalah sebab utama untuk kehilangan responden dalam kontrak dan kecuaian bukan kes yang diplinya atau dinyatakan dalam arahan. Sekali lagi isu ini adalah suatu yang berkaitan amalan pindah hak kerana berlaku dalam tahun 2000. Para pakar yang memberi keterangan tidak menyatakan bahawa ia satu keperluan untuk membuat carian ke atas peguamcara dalam tahun 2000. Walaupun amalan pindah hak di England mengkehendaki carian dilakukan ke atas peguamcara untuk mengelakkan fraud pindah hak, piawai di England tidak boleh dikenakan di Malaysia ke atas transkasi yang berlaku dalam tahun 2000 dan begitu juga dalam kes-kes di mana tiada keperluan spesifik undang-undang atau amalan atau melalui arahan anak guam untuk berbuat demikian. Dalam keadaan itu, hakim perbicaraan terkhilaf apabila beliau mendapati perayu bertanggungjawab walhal tiada isu spesifik berkaitan isu itu, terutamanya apabila SA dan pliding tersebut adalah tidak jelas (lihat perenggan 68–70).

(4) (oleh **Hamid Sultan HMR**) Tambahan pula, hakim perbicaraan telah gagal mengendalikan isu sebab mengapa ia terjadi dalam perspektif yang betul dan gagal untuk menyedari ujian berhubung sama ada ia adalah adil berdasarkan fakta untuk memutuskan perayu bertanggungjawab. Ujian asas untuk membuktikan sebab mengapa ia terjadi adalah ujian 'but for' yang mana defendan akan bertanggungjawab hanya jika kerugian penuntut mungkin tidak berlaku jika bukan kerana kecuaiannya. Berdasarkan keterangan yang dikemukakan dalam kes ini, adalah jelas bahawa perayu sebab utama atau langsung untuk kehilangan itu atau kehilangan itu tidak mungkin dijangka atau mungkin. Oleh itu, perayu tidak bertanggungjawab dalam kontrak atau kecuaian dan hakim perbicaraan telah salah arah berhubung isu liabiliti (lihat perenggan 37).

(5) (oleh **Varghese George HMR**, menentang) Tidak bolah dinafikan bahawa terdapat arahan nyata dan spesifik oleh responden bank kepada firma tersebut untuk berhubungan dengan peguamcara pemaju di kalangan pihak lain. Berdasarkan kandungan SA tersebut, satu-satunya penepian oleh bank tersebut adalah tentang kemasukan apa-apa kaveat persendirian ke atas hartanah tersebut. Oleh kerana tiada hak milik individu berasingan ke atas hartanah tersebut telah dikeluarkan lagi, sumber hak milik ke atas hartanah tersebut adalah pemaju. Ini adalah sebab mengapa arahan untuk berhubungan dengan peguamcara pemaju dan memperoleh perjanjian asal jual beli termasuk dalam SA tersebut. Selanjutnya, arahan bank tersebut tidak menimbulkan apa-apa ketaksaan, kekaburan atau kekeliruan. Oleh iu, hakim perbicaraan tidak terkhilaf untuk memutuskan bahawa terdapat arahan spesifik daripada bank tersebut untuk berhubungan dengan peguamcara pemaju bagi

tujuan mengesahkan asas dan tuan punya transaksi yang dituntut oleh penjual sebagai pembeli hartanah tersebut daripada pemaju (lihat perenggan 73–75 & 79).

(6) (oleh **Varghese George HMR**, menentang) Selanjutnya, tindakan bank yang dimulakan terhadap firma tersebut bukan hanya dalam kontrak kerana pelanggaran retainer tetapi juga dalam tort berhubung kecuaian. Ini jelas memerlukan firma tersebut melaksanakan kewajipan berjaga-jaganya ke atas bank tersebut dengan kepakaran dan sikap profesional yang munasabah bagi melindungi kepentingan bank tersebut dalam memastikan keberkesanan pendokumenan jaminan. Dengan menggunakan ujian 'but for' dalam keadaan tertentu kes ini, sebab langsung kehilangan yang dialami oleh bank tersebut adalah kelalaian atau kegagalan firma tersebut untuk mematuhi arahan spesifik bank tersebut untuk melakukan carian ke atas pemaju dan/atau berhubungan dengan peguamcara pemaju. Hakim perbicaraan dengan itu tidak terkhilaf berdasarkan fakta atau undang-undang dalam membenarkan tuntutan bank terhadap firma tersebut (lihat perenggan 96 & 102).]

Notes

For cases on professional negligence, see 2(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 1459–1549.

Cases referred to

Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng [2001] 1 MLJ 241; [2001] 2 CLJ 133, FC (refd)

Au Kong Weng v Bar Committee, Pahang [1980] 2 MLJ 89, FC (refd)

Bolam v Friern Hospital Management Committee [1957] 1 WLR 582, QBD (refd)

Caparo Industries Plc v Dickman [1990] 2 AC 605, HL (refd)

Chang Siew Lan (f) v Loh Chooi Teng (practising as Messrs CT Loh & Co a firm) [2009] 6 MLJ 776; [2010] 1 CLJ 657, FC (refd)

Chang Yun Thai & Ors v HSBC (M) Bhd & other appeals [2011] 7 CLJ 909, FC (refd)

Chatterton v Gerson and another [1981] 1 All ER 257, QBD (refd)

Chua Seng Sam Realty Sdn Bhd v Say Chong Sdn Bhd & Ors and other appeals [2013] 2 MLJ 29, CA (refd)

Co-Operative Central Bank Ltd, The v KGV & Associates Sdn Bhd [2008] 2 MLJ 233, FC (refd)

Damusa Sdn Bhd v MRCB Prasarana Sdn Bhd [2012 MLJU 795; [2012] 1 LNS 994, HC (refd)

Empire Jamaica, The [1955] 1 All ER 452 (refd)

Gray v Thames Trains Ltd [2009] 3 WLR 167, HL (refd)

Hall v Brooklands Auto-Racing Club [1933] 1 KB 205, CA (refd)

Holling v Yorkshire Traction Co Ltd [1948] 2 All ER 662 (refd)

Holman v Johnson (1775) 1 Cowp 341 (refd)
Kyros International Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2013] 2 MLJ 650, CA (refd)
Lai Poh & Sons Sdn Bhd v Skrine & Co [2001] MLJU 250; [2001] 3 CLJ 185, HC (refd)
Lamb v Camden London Borough Council [1981] QB 625, CA (refd)
Leolaris (M) Sdn Bhd v Bumiputra Commerce Bank Bhd [2013] 7 MLJ 25, HC (refd)
Lloyds TSB Bank Plc v Markandan and Uddin (a firm) [2012] EWCA Civ 65, CA (refd)
McKew v Holland & Hannen & Cubitts (Scotland) Ltd [1969] 3 All ER 1621, HL (refd)
Midland Bank Plc v Cox McQueen (a firm) [1999] 1 FLR 1002; [1999] Lloyd's Rep PN 223, CA (refd)
Midland Bank Trust Co Ltd v Hett Stubs & Kemp [1978] 3 All ER 571 Ch D (refd)
Nationwide Building Society v Davisons Solicitors (a firm) [2002] All ER(D) 141, (Apr), QBD (refd)
Skyring v Greenwood (1825) 4 B&C 281 (refd)
Stone & Rolls Ltd (in liq) v Moore Stephens (a firm) [2009] UKHL 39, HL (refd)
Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Co Sdn Bhd [2012] 4 MLJ 1, FC (refd)
UCB Corporate Service Ltd v Clyde & Co (a firm) [2000] 2 All ER (Comm) 257, CA (refd)
Wong Kiong Hung & Anor v Chang Siew Lan (f) [2009] 4 MLJ 183; [2009] 3 CLJ 75, CA (refd)

Appeal from: Suit No 22–240 of 2003 (High Court, Ipoh)

Gurbachan Singh (Ahmad Yani bin Aminuddin and Muhamad Rizal with him) (Abbas & Ngan) for the appellant.
Asbir Kaur Sanga (Navit Kaur Randhawa with her) (Asbir, Hira Singh & Co) for the respondent.

Hamid Sultan JCA (delivering majority judgment of the court):

[1] The appellant's (solicitor) appeal to set aside the judgment of the High Court in favour of the respondent came up for hearing on 4 November 2013. The appeal involved important principles relating to conveyancing practice. After hearing the submissions we reserved the judgment to 2 December 2013. My learned brother Abdul Wahab bin Patail JCA has read the draft judgment and approved the same. This is our majority judgment.

[2] The memorandum of appeal, inter alia, reads as follows:

1. The learned judge erred in law and fact when he injudiciously failed to

A consider the Appellent's plea of volenti non fit injuria as pleaded in paragraph 24 of the Amended Statement of Defence.

2. The learned judge erred in law and fact when he failed to establish the liability of SD-1, the appellant's legal assistant who handled the matter based on the respondent'ss instruction contained in Exhibit P-23 and/or otherwise
B exonerated SD-1 from liability and instead attributed constructive liability and self-blameworthiness on the appellant based on his misperception of Section 11 of the Partnership Act 1961 in an employer-employee relationship instead of the common law rule of vicarious liability.

3. The learned judge found and asserted as a matter of fact at page 9 of his
C judgment in clear language that 'rial pemalsuan dan penipuan ini tidak disedari oleh Plaintif and juga Defendan sejak pinjaman diluluskan hingga kepada masa kemungkiran membayar oleh PKS', whereby the matter had become ex turpi causa non oritur actio and fundamentally erred in law when he attached liability to the defendant only even though he said that the
D 'fraud' and 'cheating' were not known to both the respondent and appellant from the time of approval of the loan.

4. The learned judge erred in law and fact when he alluded to the fact that the appellant must do all necessary searches as a specific instruction when the respondent'ss Letter of Instruction (exhibit P-23) did not identify and
E itemize specifically the types of searches required to be done except for the specific instruction not to lodge a private caveat and that the final release could only be done after a final site inspection by the respondent'ss Regional Office at Prai as per Exhibit P-95 read together with Exhibits P-12 and P-13, signed by one Ong Gaik Leng.

F 5. The learned judge erred in law and fact for failing to take cognizance that the respondent has not proved causation when he stretched the meaning of a duty of care and the standard thereof beyond that of a 'reasonable man' to that of a 'man with prophetic foresight', thereby making damages suffered by the respondent as too remote.

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[3] The respondent/plaintiff's issues to be tried read as follows:

1. Was there a contractual relationship between the plaintiff and Abbas &
H Ngan upon the appointment of the latter as solicitors by the plaintiff to prepare enforceable security documents by way of Facility Agreements, Powers of Attorney and Assignments in respect of the 2 Apartments known as:

   (a) parcel No. 14, Level 2 bearing the address No 492A-1-12B, Sri Indah Apartments, Jalan Air Itam, 11400 Penang; and

I (b) parcel No 13, Level 3 bearing the address No 492A-2-12A, Sri Indah Apartments, Jalan Air Itam, 11400 Penang.

(hereinafter referred collectively as 'the Apartments') for the 2 housing loans totaling RM220,200 (hereinafter referred to as 'the said loans') approved by the plaintiff to Pneh Kon San?

2. If the answer to issue 1 above is Yes, was Abbas & Ngan in breach of the terms of the contract with the plaintiff when they advised the plaintiff to release the said loans without making proper enquiries, searches and enforceable Assignments?

3. If the answer to Issue 2 above is Yes, did the plaintiff suffer loss as a result of the breach of contract by Abbas & Ngan?

4. In addition to issue 1 above or in the alternative, did Abbas & Ngan owe a duty of care to the plaintiff to ensure that there were enforceable Assignments in respect of the 2 Apartments in favour of the plaintiff?

5. If the answer to Issue 4 is Yes, were they in breach of the duty of care to the plaintiff?

6. If the answer to either Issues 3 or 5 above or both Issues 3 and 5 above is Yes, what should be the measure of damages to be awarded to the plaintiff?

7. Whether the 'undertaking' given by Abbas & Ngan to the plaintiff in their letters dated 17 November 2000 addressed to the plaintiff which read as follows:

We hereby undertake to indemnify you for any and all loss and damages that you may suffer due to our negligence and/or default to the extent RM110,100 enforceable by the plaintiff?

8. Whether the solicitors for the plaintiff have acted professionally in the normal course of such transaction as practiced by all the solicitors which is accepted by the Bar Council in Malaysia?

9. Whether solicitors for the plaintiff can be held liable on the issue of fraud committed by the customer of the plaintiff without the knowledge and assistant of the said solicitors?

10. Whether the solicitors for the plaintiff can be held liable for the release of the loan sum after inspection of the site by the plaintiffs officer and giving instruction not to lodge private caveat?

[4] The appellant/defendant's issues to be tried read as follows:

(a) whether the solicitors for the plaintiff have acted professionally in the normal course of such transaction as practiced by all the solicitors which is accepted by the Bar Council in Malaysia?

(b) whether solicitors for the plaintiff can be held liable on the issue of fraud committed by the customer of the plaintiff without the knowledge and assistant of the said solicitors?

(c) whether the solicitors for the plaintiff can be held liable for the release of the loan sum after inspection of the site by the plaintiff's officer and giving instruction not to lodge private caveat?

A PRELIMINARIES

[5] The appellant practicing as solicitors under the firm name Abbas & Ngan was acting for the respondent bank as financier's solicitors in relation to a bogus sale and purchase agreement. The purported vendor as well as the purchaser, were also bogus. To compound the problem the purported solicitor who witnessed the sale and purchase agreement and who was acting for the purchaser/borrower was also bogus.

[6] To further compound the problem the sale and purchase agreement was related to apartments where the strata titles have not been issued; and the rights of the apartment owners to the land will be secured by the master title. In consequence the master title will be held in the name of the developer/owner of the project until the strata titles are issued. And the bank's interest cannot be protected by registering a charge and the bank has to be contended with a lesser mode of security such as undertaking and/or assignment. In essence, there is a greater risk element for the bank in assignment cases more so when it is a subsale as in the instant case. In consequence there will be a higher risk than in cases where the titles have been issued.

[7] In practice it is trite that conveyancing risk is usually covered by insurance companies whether it relates to solicitors or banks. Thus, conveyancing practice has its risk and can only be minimised by good and/or acceptable conveyancing practice from time to time. The risk cannot be totally eliminated in all cases and more so when fraud is involved (see *Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng* [2001] 1 MLJ 241; [2001] 2 CLJ 133).

[8] Where individual titles and/or strata titles are issued, private caveats can be easily lodged on the titles to secure the financer's banks interest before release of finance sum to the borrower or to release upon a charge being registered or capable of being registered. The same is not the case for master titles. We used the word capable because in practice the loan sum may be released without the charge being registered with the usual undertakings. This is so because the registration process will take some time. For example, a perfectionist in conveyancing practice will argue or opine that loan sum should only be released upon full confirmation that the charge has been registered, and will assert that it forms part of good conveyancing practice. Those in the conveyancing industry inclusive of bankers and solicitors will know that adjudication, stamping and registration will take some time and the conveyancing practice is to get relevant undertaking from the respective solicitors namely — vendor, purchaser, developer, financer, solicitors, etc. However, when one of them is bogus or fraud or it is a fraudulent scheme then the parties who need to be

protected will not be protected at all. (See *Janab's Key To Practical Conveyancing and Islamic Banking* (2nd Ed) (2013) pp 92–95 captioned 'Conveyancing Fraud can be Averted by Legislation'). A

[9] This is what has happened in this case. And two eminent conveyancing practitioners have given evidence, one supporting the respondent (Ms Low Beng Choo — SP7) and the other the appellant (Mr Yeo Yang Poh — SD2). B

[10] The respondent's expert has taken a perfectionist approach and the appellant's expert has taken a realistic and practical approach. The learned trial judge had accepted the appellant's expert evidence but went on to say the appellant was in breach without appreciating the scope of duty and obligation of the financier's solicitors, taking into consideration that the respondent was instrumental in entertaining a bogus sale and purchase agreement, without a proper vetting process before the loan was approved. And more so without any specific instruction to the appellant to check whether the sale and purchase agreement was bogus or the borrower was bogus. The searches which were asked to be conducted were related to incidental matters for completing the loan documents and release of the loan sum and there was no specific instruction to check the status of solicitors or the legality of the sale and purchase agreement itself. In the instant case the bogus borrower's solicitor. In short the respondent is not an innocent party to the whole episode and was negligent in approving the loan as well as giving appropriate instruction to the appellant. The letter of instruction was a general letter to cover properties with title as well as without titles. The deletions on some parts in the said letter will also demonstrate that it is one of general instruction and not specific instruction. And some of the paragraphs which have not been deleted will also reflect that it is a general instruction. C D E F

[11] The transaction took place in the year 2001 and there was no conveyancing practice to do any official search of bogus solicitors with the Bar Council at the material time. Both the experts in their witness' statements in relation to conveyancing practice did not say there was a requirement to do official search with the Bar Council. It was also not established in cross-examination that such a practice was in vogue or Bar Council had given specific directives of that nature. A perfectionist conveyancing practitioner will opine it will be a good practice to do so. And this line of opinion can continue by saying (i) even the practicing certificate should be checked; (ii) the signature of authorities in the practicing certificate must be checked; etc. G H I

[12] The learned trial judge also erred when he relied on the evidence of SD1 on matters relating to conveyancing practice; who was a novice to the profession having only one year experience in conveyancing.

[13] In practice there is much recognition by the industry (inclusive of the insurance companies) to the Bar Council and its practicing members; and the realistic and practical approach members take in conveyancing matters according to the facts; coupled with the fact that the risks are generally insured by the solicitors as well as the banks. And conveyancing practice in this country cannot function smoothly without reliance on its members and/or insurance companies. Not all eventualities can be avoided by good conveyancing practice alone when the underlying cause is related to fraud. The learned trial judge did not consider the defence case in the right perspective notwithstanding *the appellant's expert had given evidence to show there was no breach on the part of the appellant* (Emphasis added.)

[14] What is important to note is that the learned trial judge has failed to appreciate an action against a conveyancing solicitor, for breach of contract or negligence materially depends on the conveyancing practice in vogue at the material time. The solicitor is expected to act within the parameters of conveyancing practice. The test is a 'reasonable professional man of that profession test' and the scope of the duty is one which has to be determined by evaluating what failure actually caused the loss. Just omission or purported omission to do relevant search which was not directly involved to the loss alone cannot be the factor, taking into consideration that there need not be duplicity in the search when solicitors acting for various parties represent that they have done the relevant search or have secured the relevant documents, etc.

[15] In this case the direct loss was as a result of the bogus solicitor, borrower and sale and purchase agreement, and not really the other purported omissions which were not specific and complained of by the respondent.

THE RESPONDENT/PLAINTIFF'S CASE

[16] The respondent's case is that the appellant was in breach of contract and duty of care in preparing the loan documents. The loan documents were found to be invalid and unenforceable and in consequence they suffered loss and damage.

[17] Particulars of breach of contract in the statement of claim read as follows:

Particulars of Breach of Contract

1. Failing to carry out the necessary searches at the Registry of Companies (now Companies Commission of Malaysia) on the alleged vendor, Metro Development Sdn Bhd and on the developer/Proprietor to ascertain the relevant particulars which would have alerted the plaintiff of the fraudulent transaction involving the alleged vendor and the Borrower.

2. Dealt with one KY Lee of M/s KY Lee & Associates, who fraudulently misrepresented himself as a solicitor acting for one Metro Development Sdn Bhd, the alleged vendor/beneficial owner of the Apartments.

3. Accepting and transmitting to the plaintiff the undertakings dated 28 October 2000 by the alleged vendor, Metro Development Sdn Bhd without any caution.

4. Consequently failing to advise the plaintiff that the purported undertakings by Metro Development Sdn Bhd dated 28 October 2000 were worthless.

5. Failing to obtain an enforceable undertaking from the developer/proprietor addressed to the plaintiff to forward the Strata Titles for the Apartments upon issuance together with Transfers under Form 14A National Land Code 1965 duly signed by the registered proprietor.

6. Misrepresenting to the plaintiff that the Consents by the developer/proprietor of the Apartments had been obtained to the Assignment of the Apartments to the plaintiff as security for housing facilities thereby causing the plaintiff to accept the Sale & Purchase Agreements between the alleged vendor and the Borrower dated 15 July 2000 valid and genuine.

7. Further or alternative, the Firm failed to discharge the duty of care it owed to the plaintiff.

Particulars of Negligence

1. Failing to ensure that the plaintiffs interest as assignee of the Apartments was at all material times intact and enforceable in the event of any default by the Borrower.

2. Failing to advise the plaintiff that it was prudent to lodge a private caveat against the Master Titles though the plaintiff had expressly stated that the same were to be waived in its letter of instructions to the Firm.

3. (a) Failing to ensure that alleged Consents by Lip Sin Company Sdn Bhd, the developer/proprietor to the Assignments in favour of the plaintiff were signed by its duly authorised officer.

   (b) Advising the plaintiff that the security documents dated 14 November 2000 were in order and enforceable when the Consents to the Assignments were purportedly signed by Ang Poon Soon who had died on 14 June 1998 and hence the chain of title was flawed.

4. Failing to forward to the plaintiff valid and enforceable security documents were for the Housing Loans advanced by the plaintiff.

5. Failing to carry out the necessary searches with such Authorities as that it were necessary to protect the plaintiffs interest.

6. Failing to obtain the necessary and enforceable undertakings from the

developer/proprietor and Metro Development Sdn Bhd, the alleged vendor before advising the plaintiff on the disbursement of the Housing Loans.

7. Failing to make relevant enquiries which would have revealed that the Sale & Purchase Agreements forming the chain of Title were forgeries.

8. Failing to exercise the skill required of a prudent conveyancing solicitor.

9. Failing to inform the plaintiff upon becoming aware of the fraudulent dealings by KY Lee & Associates after receiving the Memo from Bar Council on 29 September 2001.

Particulars of Loss and Damage

1. The Borrower has defaulted in payment of the monthly installments since February 2001.

2. Loan recovery investigations revealed that Metro Development Sdn Bhd, the alleged vendor, was never the beneficial owner of the Apartments.

3. The plaintiff cannot recover the Housing Loans disbursed and interest payable thereon as the security documents are worthless.

4. The Borrower cannot be traced.

5. By its letters dated 17 November 2000, the Firm undertook to indemnify the plaintiff to the extent RM220.200 for any loss the plaintiff may suffer due to the Firm's negligence and/or default.

   5.1 Pursuant to the undertaking given by the Firm, the plaintiff through its solicitors, sought to recover the same from the Firm by way of a letter of demand dated 21 May 2003 issued by the plaintiffs solicitors.

   5.2 To date the Firm has failed and/or neglected to reply the plaintiffs solicitors' letter dated 21 May 2003 or make good the loss suffered by the plaintiff.

6. As at 30 September 2003 the sum owing to the plaintiff under the Housing Loans is RM260,266.71 inclusive of interest at the rate of 2.00% per annum above the plaintiffs Base Lending Rate with monthly rests from 26 December 2000 to 30 September 2003 which is chargeable under the facilities agreements.

[18] What is pertinent to note in the pleadings of the respondent is that there is no complaint that the appellant did not search with the Bar Council in respect of the status of the bogus lawyer or law firm. In addition, there is no complaint that the appellant was instructed to check the status of the parties to the sale and purchase agreement. In essence, there was from the pleaded case of the respondent no complaint as to these two issues which are the material and dominant cause for the loss and damage to the respondent.

[19] The learned counsel for the appellant has summarised the appellant's case as follows:

(2) It is respectfully submitted that the learned judge fell into error in allowing the respondent's claim.

(3) Taking the respondent's case at its highest, the fact remains that the respondent had acted in the belief that they were involved in a valid transaction. Such loss as it suffered was not the consequence of the appellant. Rather it was caused by the respondent and was the consequence of fraud to which the respondent fell victim to. In this regard:

3.1 It is settled that a party suing in negligence must establish that:

3.1.1 a duty of care of the nature asserted existed;

3.1.2 the said duty had been breached by the defendant; and

3.1.3 an injury had been caused by the defendant having breached the said duty.

(see *Caparo Industries plc v Dickman* [1990] 2 AC 605).

3.2 the respondent's injury was not caused by the failure of the appellant to verify the legal instruments pertinent to the land transaction. It was caused by the fraud of third parties;

3.3 the pleaded case of the respondent that the appellant had breached his duties owed to the respondent by not having advised on the following:

3.3.1 failing to advise the respondent on whether it was prudent to lodge private caveats against the master title of the properties notwithstanding the respondent'ss instructions to waive the same;

3.3.2 failing to conduct necessary searches in order to protect the respondent's interest;

3.3.3 failing to make relevant inquiries that would have revealed the forgeries;

3.3.4 failing to exercise the skills required of a prudent conveyancing solicitor; and

3.3.5 failing to inform the respondent upon becoming aware of the fraudulent dealings.

In a nutshell, it suffices to say that all of this was clearly beyond the appellant's knowledge and scope of his retainer; and

3.4 on this ground alone the respondent's claim ought to have been dismissed.

(4) Further to the above, having been instructed by way of the Letter of

A Instructions, the appellant cannot be expected to go beyond the express terms of the same. In this regard:

4.1 the Court of Appeal in *Wong King Hung & Anor v Chang Siew Lan & Another Appeal* [2009] 3 CLJ 751 held that the solicitors were not negligent for following their duties under the SPA. In this light, the B court did not impose any implied expectation on the solicitors to act beyond the SPA;

4.2 therefore, when a solicitor complies with the express terms of the retainer, the solicitor could not be said to be negligent and to expect the solicitor to have done more would be requiring the solicitor to C guard against fantastic possibilities;

(see *Chang Sew Lan (f) v Loh Chooi Teng (practising as Messrs CT Loh & Co a firm)* [2010] 1 CLJ 657 whereby Gopal Sri Ram (FCJ) held as follows:

D (1) The danger of an embezzler acting as the vendors' solicitor did not enter upon the scene in view of the express directions in the sale and purchase agreement. It was therefore not negligence for the respondent to do what she did, namely, to comply with the duty imposed on her by the terms of the sale and purchase agreement To have expected her to have done more in the circumstances of the present case would have required her to have guarded against fantastic possibilities. E

4.3 Further, the appellant could not be faulted for assuming the transaction was valid. In this regard, the following passages in the Federal Court of *Chang Yun Thai & 177 Ors v HSBC (M) Bhd & Other Appeals* [2011] 7 CLJ 909 are instructive:

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[13] The respondent is not a party to the SPA. The SPA is the respective appellant's contract with the developer. Therefore, the duty is cast on the appellants rather than the respondent to ensure that the SPA is free from any legal infirmity. If they have omitted to do so, we are of the view they cannot rely on their default to defeat G the respondent's claim to repay their loans. On this point we would cite the case of *Golden Vale Golf Range & Country Club Sdn Bhd v Hong Huat Enterprise Sdn Bhd* [2008] 6 CLJ 31 wherein Gopal Sri Ram, JCA (as he then was) at p 39 had this to say:

H If this clause is to be given effect to, it would mean that Airport Auto could rely on its own failure to complete the sale and thereby defeat the defendant's claim for specific relief. It would mean that Airport Auto could rely on its own wrong to its advantage. Settled authority has held that a party cannot rely on its own wrong to defeat its opponent's claim.

I [14] It is also our considered view that the respondent has no duty to advise the appellants as borrowers in the present case because it is merely a financing bank and not an advisory bank. Generally speaking, in a commercial loan a lender is entitled to seek and obtain the best terms it can. It may have regard solely to its own commercial interest. It is not the lender's obligation to ensure that the borrower has made a correct

or wise commercial decision based upon a full understanding of all risks unless the borrower has specifically sought the lender's advice. (See the case of *Redmand v Allied Irish Bank Plc* [1987] FLR 307).

[15] It is to be noted the SPA has already been executed before the end financing facilities were granted. Therefore the respondent can presume that the SPA which the appellants had entered into has been ascertained by the appellants to be valid. It would be too onerous to require the respondent to investigate or enquire into a transaction or contract to which they are not a party. Banking business will be rendered impracticable and burdensome if this was so.

(5) Based on the aforementioned submission, the appellants pray that the appeal be allowed with costs.

[20] It is pertinent to note that the appellant had anchored his appeal based on two legal maxims namely: (1) *volenti non fit injuria*; and (ii) *ex-turpi causa non oritur actio*; on the basis that the tort to commit fraud by the bogus lawyer as well as the purchaser has already commenced even before the respondent agreed to provide the loan and that too before the appointment of the appellant.

[21] *Volenti non fit injuria*, in essence means harm suffered by consent is not actionable. We do not see how this legal maxim will assist the appellant in all aspect save as to the issue such as the respondent has instructed not to lodge a private caveat on the master title etc; inclusive of the fact the money was released after the plaintiff's inspection of the site (see *Hall v Brooklands Auto-Racing Club* [1933] 1 KB 205; *Chatterton v Gerson and another* [1981] 1 All ER 257).

[22] In the instant case the respondent or appellant has not consented to the injury. The injury was as a result of fraud committed on the respondent as well as the appellant.

[23] The real issue on the appointment as financier's solicitor is whether the appellant had discharged his duty according to law and/or conveyancing practice, and not whether the legal maxim *volenti non fit injuria* will exonerate the appellant.

[24] The legal maxim *ex turpi causa non oritur actio*, which means a plaintiff will be unable to pursue a legal remedy if it arises in connection with his own illegal act, may assist the appellant even though the respondent was not pursuing any illegal act but at the most was a victim of fraud. Lord Mansfield as early as the 18th century explained this concept and the illegality doctrine in the case of *Holman v Johnson* (1775) 1 Cowp 341 as follows:

> The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this; *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiffs own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, *potior est conditio defendentis.*

[25] Over the years the concept was not just restricted to illegality but the courts on public policy grounds had disallowed the plaintiff from recovering anything stemming from the plaintiff's own wrong doing (see *Gray v Thames Trains Ltd* [2009] 3 WLR 167; *Stone & Rolls Ltd (in liq) v Moore Stephens (a firm)* [2009] UKHL 39). The Federal Court in *Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Company Sdn Bhd* [2012] 4 MLJ 1 had this to say:

> [21] The fraud exception relies upon the maxim ex turpi causa non oritur actio (no action arises out of a dishonourable cause). The fraud exception is thus recognised to balance the risks between the parties.

[26] In our considered view the two doctrines canvassed by the appellant in the instant case may not absolutely exonerate the appellant from liability save to say that the doctrine may assist to show that the respondent was itself negligent in conducting its affairs causing the loss.

[27] As a general rule, whether in contract or in tort where the defendant owed a duty of care to the plaintiff and if that duty is breached resulting in loss or damage to the plaintiff, the defendant will be liable (see *Leolaris (M) Sdn Bhd v Bumiputra Commerce Bank Bhd* [2013] 7 MLJ 25; *Skyring v Greenwood* (1825) 4 B&C 281). It is also trite that an act of the plaintiff (claimant) when in whole or part, unreasonably adds to the loss, may give the defendant a defence to liability.

[28] Whether the plaintiff or defendant acted unreasonably or not in responding to the situation is a matter for the courts to weigh on the facts of each case. In deciding the issue the chain of causation or the doctrine of *novus actus intervenieus* may be a determining factor (see *McKew v Holland & Hannen & Cubitts (Scotland) Ltd* [1969] 3 All ER 1621).

[29] In the instant case it must not be forgotten the respondent has *fueled* the tort or crime when it approved the loan and the tort or crime continued until it caused loss or damage to the respondent (Emphasis added). The duty of care and breach complained of relates to professional conduct of the appellant. And to determine whether the appellant had breached the duty, whether in contract or tort, *the opinion of the expert of the profession plays a major role to determine the issue according to their professional standards or obligations* (see *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582) (Emphasis added.)

[30] The respondent/plaintiff's expert in examination in chief, inter alia, had this to say:

Q6 : Are you familiar with Conveyancing practice pertaining to:

(i) sale and purchase of houses or apartments where no individual titles or strata titles are issued at the time of the purchase and completion of the sale-purchase transaction?

(ii) the type of security documents to be prepared for the financing of the purchase of apartments where no strata titles are issued at the time of completion of the sale-purchase transaction?

A : Yes, I am familiar with both.

Q7 : Can you please explain to this Court what documents are necessary to effect a sale-purchase and for the conveyance of all the vendor's rights, interest and title in and of an apartment by a vendor to a second purchaser, where the vendor is a first-original purchaser of the apartment from a proprietor and developer, and the strata title had not been issued in the year 2000?

A : The documents necessary would include the following:

7.1 relevant searches on the vendor, proprietor, developer and second purchaser with the Official Assignee or Official Receiver and Companies Commission of Malaysia (where the party concerned is a company);

7.2 land search on the master title on the land upon which the apartment is sited;

7.3 a check on the validity of the housing developer's licence of the developer with the Ministry of Housing;

7.4 the original of the sale-purchase agreement pertaining to the apartment made between the proprietor and developer, and the vendor as the first-original purchaser thereof;

7.5 the originals of all loan documents, if any, pertaining to any loan or other banking facilities taken by the vendor from the vendor's financier to finance the vendor's purchase of the apartment from the proprietor and developer, and which loan and other banking facilities are secured by an assignment of the apartment;

7.6 a redemption statement and undertaking letter from the vendor's financier for a full and complete redemption and reassignment of the apartment;

7.7 the original duly executed and stamped deed of receipt and reassignment document pertaining to the apartment for a full and complete redemption and reassignment to be made between the vendor and the vendor's financier;

7.8 a duly executed an stamped sale-purchase agreement incorporating the terms and conditions of the sale-purchase transaction, as well as a duly executed adjudicated and stamped deed of assignment for the assignment of rights, interest and title in and to the apartment, to be made between the vendor-assignor and the second purchaser-assignee; and

7.9 consent and certain confirmations and undertakings from the proprietor and developer pertaining to the vendor's ownership of the apartment, and for delivery of a relevant transfer and the strata title upon issuance of such strata title.

Q8 : Please tell this court in a case where a solicitor has received instructions to act and prepare loan documentation for a bank who has granted a loan to the second purchaser in the above sale-purchase transaction, what searches and steps are necessary for the solicitor to do or undertake to protect the interest of the bank, bearing in mind that no strata title had been issued for the apartment in 2000?

A : The searches and steps necessary would include the following:

8.1 relevant searches on the vendor, proprietor, developer and second purchaser with the Official Assignee or Official Receiver and Companies Commission of Malaysia (where the party concerned is a company);

8.2 land search on the master title of the land upon which the apartment is sited;

8.3 a check on the validity of the housing developer's licence of the developer with the Ministry of Housing;

8.4 to obtain custody of the original of the sale-purchase agreement pertaining to the apartment made between the proprietor, the developer, and the vendor as the first-original purchaser thereof. If the apartment has been assigned by the vendor to the vendor's financier, then this should be obtained from the vendor's financier upon a full and complete redemption of the apartment;

8.5 to obtain custody of the originals of all loan documents, if any, pertaining to any loan or other banking facilities taken by the vendor as the original first purchaser from the vendor's financier to finance the vendor's purchase of the apartment from the proprietor and developer, where the loan and other banking facilities are secured by an assignment of the apartment. These loan and other documents

should be obtained from the vendor's financier upon a full and complete redemption of the apartment;

8.6 to obtain a redemption statement and undertaking letter from the vendor's financier for a full and complete redemption and reassignment of the apartment, confirming the full redemption sum to be paid and undertaking to forward the necessary reassignment documents upon receipt of the redemption sum and undertaking to refund the redemption sum if the reassignment cannot be perfected or completed;

8.7 to obtain custody of the original duly executed and stamped deed of receipt and reassignment document to be made between the vendor and the vendor's financier pertaining to the apartment upon full and complete redemption and reassignment;

8.8 to obtain the original of the duly executed and stamped sale-purchase agreement made between the vendor and the second purchaser, incorporating the terms and conditions of the subsale-purchase transaction, we well as the original duly executed, adjudicated and stamped deed of assignment for the assignment to be made between the vendor-assignor and the second purchaser-assignee whereby the vendor-assignor assigned his or her rights, interest and title in and to the apartment to the second purchaser-assignee;

8.9 to obtain certain confirmations and undertakings from the proprietor and developer pertaining to the vendor's ownership of the apartment, and also an undertaking for delivery of a relevant transfer and the strata title upon issuance of such strata title;

8.10 to prepare and obtain execution, stamping and custody of the necessary loan agreement to be made between the second purchaser and the purchaser's financier-bank, incorporating the terms and conditions of the loan, a power of attorney to be granted by the second purchaser in favour of the purchaser's financier-bank for the apartment, as well as a duly executed and stamped deed of assignment for the assignment to be made between the second purchaser as assignor and the purchaser's financier-bank as assignee whereby the second purchaser would assign to the second purchaser's financier-bank all his or her rights, interest and title in and to the apartment; and

8.11 to obtain the vendor's undertaking to refund the loan sum to be released to the vendor as part of the purchase price payable to the vendor for the apartment in the event the assignment of the apartment by the vendor to the second purchaser cannot be effected or completed.

Q9 : What is the relevance and importance of carrying out searches with the Companies Commission of Malaysia and the Official Assignee or Official Receiver on the developer, proprietor and vendor (first purchaser)?

A : 9.1 The searches with the Official Assignee (where the party concerned is a natural person) and Official Receiver (where the party concerned is a company) are to obtain confirmation that:

(i) the party concerned is not a bankrupt (in the case of an individual) or has not been wound up (in the case of a company); and

(ii) that there are no pending winding-up proceedings brought against the company.

9.2 Where the party concerned is a company, the search with the Companies Commission of Malaysia is to obtain the following confirmation:

(i) the status of the company (for example whether it is in active operation), and to obtain information of its shareholding and directorship. The confirmation of the directorship is important to ascertain the authority of the signatories of the party concerned; and

(ii) the party concerned has not been wound up and that there are no pending winding-up proceedings brought against the company.

Q10 : In the year 2000, if you were the bank's solicitors, would you advise the bank in the above case to lodge a private caveat to protect its interest if the bank had instructed you that private caveat was to be waived since the developer was in the process of applying for strata titles?

A : I would advise the bank of the risk it would be taking if it waived the lodgment of a private caveat, in that since the master title would still be registered under the proprietor's name as registered owner, the proprietor would be able to deal with the land under the master title, such as creating further charges or other dealings, without any notice to the bank.

Q11 : Please explain to the Court that where there is no strata title issued for the apartment, what was the significance and purpose of obtaining a consent and undertaking from both the proprietor and developer to an assignment of the rights, interest and title in and to the apartment pursuant to a deed of assignment made between the vendor and the second purchaser in the above stated transaction?

A : In such a transaction, the importance of obtaining consent and undertakings from both the proprietor and developer was to ensure that:

11.1 the solicitor obtained particulars of the master title of the land upon which the apartment was sited, and ascertained the stage and status of the proprietor and or developer's application for the strata title for the apartment;

11.2 the solicitor obtained confirmation of the status and completion of the construction works on the apartment, and the status of the issuance of the Certificate of Fitness for Occupation therefore;

11.3 the solicitor obtained confirmation that vendor was the original owner of the apartment and that his rights, interest and title to the apartment were intact, and also obtained information pertaining to the vendor's financier and any other assignments, charge, caveat or other encumbrance affecting the apartment;

11.4 the solicitor obtained confirmation of the amount, if any, still due and owing by the vendor to the proprietor and the developer, confirmation of full payment of the total purchase price by the vendor to the proprietor and or developer under the original-first sale-purchase agreement made between the proprietor, developer and the vendor as original-first purchaser, as well as confirmation of full payments for quit rent, assessment, utilities, service and maintenance charges;

11.5 the solicitor obtained a waiver by all charges, caveators and or other encumbrancers of the proprietor and developer that such charges, caveators and encumbrancers all do not have any right, interest or title to the apartment and that no foreclosure or other proceedings will be instituted by them would affect the apartment;

11.6 the solicitor gave notice to the proprietor and developer that the vendor has sold the apartment to the second purchaser and has therefore assigned all the vendor's rights, interest and title in and to the apartment to the second purchaser. This would enable the proprietor and developer to update their record of ownership of the apartment accordingly;

11.7 the solicitor obtained the undertaking from the proprietor and the developer:

(i) not to further deal with or encumber the land under the master title; and

(ii) to deliver the strata title to the bank upon its issuance so as to enable a transfer of the strata title by the proprietor to the second purchaser.

Q12 : According to good Conveyancing Practice in the year 2000, in the case where the second purchaser has assigned his rights, interest and title in and to the apartment under a deed of assignment to a bank which is the second purchaser's financier as security, how would you, as solicitor for the bank, obtain the above necessary consent and undertaking of the proprietor and developer?

A : As solicitor, I would write to both the proprietor and the developer separately, at their respective latest company address, for the necessary confirmations and undertakings.

Q13 : Who should be required to sign the consent and undertaking to be given by the proprietor and developer?

A : The letter from the proprietor and developer should be signed by a director

of each of the respective proprietor and developer companies, or by a lawful Attorney pursuant to a valid and subsisting Power of Attorney granted.

Q14 : If the sale and purchase agreement between the proprietor, developer and vendor as original-first purchaser is signed by a person identified as a general manager of the proprietor or developer without any verification in the form of a company resolution or separate written confirmation, would you consider that as good Conveyancing Practice in the year 2000?

A : I would not consider that as not good prudent Conveyancing Practice. For good prudent Conveyancing practice, I would advise the solicitor doing the subsale-purchase transaction to obtain either a company resolution stating the authority of the signatory or a separate written confirmation on the company's letterhead, signed by the director of the company stating the authority of the signatory or a valid subsisting Power of Attorney appointing the signatory as the company's lawful attorney.

Q15 : According to good Conveyancing Practice, in a subsale transaction, what is the significance of obtaining the vendor's undertaking, addressed to the second purchaser's bank-financier to refund the loan granted by the bank to the second purchaser, in the event that the assignment of the property cannot be effected or completed by the vendor to the second purchaser?

A : There is no privity of contract or agreement made or signed directly between the vendor and the second purchaser's bank-financier, as the vendor is not a direct party to the second purchaser's loan, and yet the loan sum would be released and paid by the second purchaser's bank-financier to the vendor. Therefore, such an undertaking is important as it would be the legal document which the bank-financier could enforce against the vendor to obtain a refund of the loan sum released and paid to the vendor in the event that the assignment of the property by the vendor to the second purchaser cannot be effected or completed.

Q16 : According to good Conveyancing Practice, where the vendor is a company, would such an undertaking by the vendor-first purchaser that is not given on its letterhead signed by an unidentified signatory to refund the loan to be released by the second purchaser's bank-financier in the event that the Loan Agreement cum Assignment made between the second purchaser-borrower cannot be effected for any reason be accepted as a valid and enforceable undertaking?

A : Whether the undertaking is given on the vendor's letterhead is not so important. What is important is that the signatory or signatories should be an authorised signatory or signatories, as confirmed in writing by way of a company resolution or separate written confirmation by the vendor-company or by a valid and subsisting Power of Attorney.

Q17 : In a case where after a solicitor acting for the bank-financier had advised

the bank to release the loan and where after such loan sum is released, the solicitor then becomes aware that:

i) there was a fraud perpetuated by the second purchaser-borrower on the bank; and

ii) the solicitors acting for the second purchaser in the sub sale-purchase transaction is not a legitimate firm of Advocates & solicitors of the High Court of Malaya;

what action would you advise the solicitor acting for the bank to take?

A : I would advise them to take the following action immediately or as soon as may be practicable when the solicitors have notice of the fraud:

17.1 to inform the bank-client of the fraud and the bogus law firm and to discuss with the bank-client on the necessary steps to be taken in the circumstances to protect the interest of the bank-client;

17.2 to lodge a police report against the second purchaser-borrower and the bogus law firm; and

17.3 to file a complaint with the Bar Council as regards the bogus law firm.

Q18 : Do you recall when the Bar Council issued the ruling that the vendor and purchaser should not be represented by the same solicitors?

A : The Rules under the solicitors Remuneration Order 1991 (SRO 1991), which came into force effective 1 January 1992, provide for scale fees for solicitors to act for one party only, either the vendor or the purchaser, in a sale-purchase transaction under the First Schedule.

Under Rule 3(a), it was stated remuneration of a solicitor 'having conduct of the business whether for the vendor or purchaser shall be in accordance with the First Schedule'.

The wordings of the SRO 1991 are clear enough to be read as to not allow a solicitor to act for more than one party in a particular transaction.

The Bar Council Rulings 1997 further clarified this position, under Part VI Ruling 19, that 'a solicitor shall act for one party only in any transaction under the First, Second and Fourth Schedules of the solicitors Remuneration Order 1991 but may witness or attest the signature of the other party without charge'.

The Bar Council Rulings 1997 have since been superseded or replaced by the Rules and Rulings of the Bar Council 2007, and the above Ruling is not stated in these new Rules and Rulings as the SRO 2005 has express wordings to not allow a solicitor to act for more than one party in a transaction governed thereunder, which includes a sale-purchase transaction.

The SRO 1991 have been revoked and replaced by the SRO 2005 which came into force on 1 January 2006. Rule 7 of the SRO 2005 expressly states that In any transaction referred to in the First, Second, Third and Fourth Schedules, a solicitor shall not act for more than one party in a particular transaction. The First Schedule of the SRO 2005 governs sale-purchase transaction.

[31] The appellant's/defendant's expert in examination in chief had this to say:

Q4 : I refer to pages 13–14 of Bundle H, which is a Letter of instructions dated 18-10-2000 issued by the plaintiff to the firm of M/s Abbas & Ngan. What were the instructions (in gist) contained in the letter?

A : The law firm was instructed to act for the plaintiff who had agreed to grant a loan to a borrower by the name of Pneh Kon San, to partially finance the purchase of 2 units of apartment by the borrower. The firm was instructed to prepare the relevant security documents in the standard formats of the plaintiff. In this case, it involved Facilities Agreements and Deeds of Assignment, since individual titles to the 2 properties had not yet been issued. The firm was also requested to make the necessary searches. I also notice that the plaintiff had instructed that the lodgment of a private caveat be waived.

Q5 : What do you consider were the necessary searches to be made in the circumstances of such an assignment?

A : Bearing in mind that this was a matter of preparation of loan documentation, with the sale & purchase agreement already concluded and the letter of offer of loan already issued by the plaintiff to the borrower, a solicitor acting for the plaintiff in such circumstances would in the usual conveyancing practice conduct a land search, and a bankruptcy search on the borrower.

Q6 : Do you consider it the duty of a solicitor for the plaintiff in those circumstances to also conduct other searches, such as a search with the I/C Department, or a company search on the vendor of the property or on the developer?

A : No, it is not the usual practice to make those searches in the circumstances, in the absence of specific instructions requiring the same.

Q7 : Why do you say so?

A : There are a number of reasons. Firstly, the solicitor was acting for the financier, not the borrower. Neither was he acting for any party in the sale & purchase. He was, in this sense, 'one-layer removed'. He was 'to take it from there'. His duty was to cany on from the sale & purchase. His scope of responsibilities was related to the preparation of loan documentation only. He was not required to go back to square one, and to take care of matters pertaining to the sale & purchase.

Secondly, a financier's solicitor's duty is legal (rather than investigative) in nature. He is not required to investigate or 'audit' what has already been done in relation to the sale & purchase. For example, he is not expected to verify that parties had executed the sale & purchase agreement with free will, or that the terms in it accurately reflect what the parties have agreed upon, or that the deposit or differential sum has really been paid, etc. In the absence of any reasonable cause for suspicion, he is entitled to accept what has been done, and to take it from there.

Thirdly, where another firm is acting in the sale & purchase ('the S & P solicitor'), a financier's solicitor's duty is to correspond with the S & P solicitor, to obtain documents, information and confirmations from them. The financier's solicitor is entitled to rely on the documents, information and confirmations obtained from the S & P solicitor. He is not expected to encroach into the sphere of duty of the S & P solicitor.

I do understand that, in this case, the problem arose because the S & P solicitor turned out to be a bogus firm. In my view, this is the crucial difference between this case and other cases involving similar types of loan documentation. But this precisely points to the fact that it was a case of fraud perpetrated on both the financier and its solicitor, and not a case of negligence or breach of contractual duty. The same things that were done in this case, if done in other cases not involving a bogus firm, would have satisfied the normal and acceptable conveyancing practice. The only difference in this case is that the 'solicitor' handling the sale & purchase was a bogus firm, and the transaction was bogus. It was a fraudulent scam.

Q8 : You have said that in those circumstances it was not the usual practice for a financier's solicitor to conduct those other searches (unless specifically instructed). Would you however say that it would have been a good practice for a financier's solicitor to do so nevertheless?

A : I would not term it a 'good practice'. I would call it 'hindsight practice'. Hindsight is usually perfect. After the event, one knows what one could easily have done (or could easily have avoided), so that a fraud would not have been successful. But that would be a practice by hindsight, something that cannot be expected of a solicitor. If that is to be considered a 'good practice', then so will many other things currently not done in normal conveyancing practice. There will be an almost endless list of things that can be added as 'good practice' (since different steps are required to detect or prevent different methods of fraud). If that were to be done, normal conveyancing practice will become extremely cumbersome and impractical, because there is no end to the measures one can take to detect or prevent possible fraud.

It is always easy to say, after the event, that 'it would not have happened if only he had done that simple thing'. But that is the benefit of hindsight. It can apply to almost every scenario. After the event, there is always that simple thing that could have been done to prevent its occurrence. To expect this kind of action beforehand is not to maintain an acceptable standard of practice, but to require an impossible standard of practice that comes only with the benefit of hindsight.

Q9 : In your experience, did banks and finance companies (in 2000) require I/C searches to be done on their borrowers?

A : No. In most cases, that was not required. The financier would specifically instruct its solicitor, if it wanted that to be done. banks had a 'turn around time' for loan documentation. I/C searches used to take a long time, and would not meet the turn around time. In fact, even bankruptcy searches were sometimes waived at that time (when it was slow in coming).

Q10 : When the solicitor in the defendant firm relied and acted on documents forwarded to them by the plaintiff bank after loan approval was granted by the plaintiff on its violation, is it the duty of the defendant to do investigative searches on the Borrower?

A : No, unless there is specific instructions to do so.

Q11 : Please look at pp 133–147 (exh P-4) and pp 148-162 (exh P-5) of Bundle H, which are the subsale agreements furnished by the plaintiff to the defendant firm. On the fact of it, was there another law firm acting in the sale & purchase?

A : Yes. On the face of it, a firm called KY Lee & Associate (of 1st Floor, No. 4N, Jalan AirItam, 11400 Penang) was acting in the sale & purchase.

Q12 : In that situation, ie where there was another firm on record for the sale & purchase, was it the responsibility of the plaintiff's solicitor to verify the authenticity of documents, information and confirmations provided by the S & P solicitor?

A : No, unless there is something on the face of it that reasonably gives rise to suspicion. As I have explained earlier, the financier's solicitor is entitle to rely on the documents, information and confirmations provided by the S & P solicitor.

Q13 : When a law firm deals with another firm, must it verify with the Bar Council whether the other firm really exists?

A : No, that is not normally done at all. An enquiry might be made in rare cases where there is something on the face of it that reasonably gives rise to suspicion. Law firms deal with one another every day. If making an enquiry of this nature is a requirement or a recommended practice, then over the years the Bar Council would have been receiving hundreds of enquiries each day. That is certainly not the case. An enquiry of this nature can also be 'endless' in a way, or at lease very cumbersome even on the enquirer, because there are always many more things that one can enquire apart from the mere existence of a firm.

Q14 : Are you aware whether the Bar Council was later alerted to the presence of the bogus firm of KY Lee & Associates?

A : Yes, the Bar Council was later alerted to it. I was in the Council then. I remember that the Council directed its then Executive Director to lodge a police report on the matter, because we believed it was a case of fraud that had affected many of our members, and a number of banks.

Q15 : Do you agree that both the plaintiff and the defendant in this case are victims of the scam?

A : Yes

[32] We have read the appeal records and the submissions of the parties in detail. We are grateful to the learned counsel for the comprehensive submissions. After much consideration and deliberation on the submission of

the learned counsel for the respondent we take the view that the appeal must be allowed. Our reasons, inter alia, are as follows:

(a) The respondent on 21 January 2002 had lodged a police report to state that they were cheated by the borrower and they had suffered a loss of RM220,000. In evidential term the cause of the loss as admitted by the respondent is in consequence of the cheating. The said police report in exh P15 reads as follows:

> Pada 29 September 2000 seorang lelaki bernama PNEH KON SAN, No KP 560219-07-5667 (5142556) telah datang ke bank kami RHB bank Bhd d/a 433 & 435 Jalan Silibin, Taman Silibin 30100 Ipoh. Pneh Kon San telah memohon pinjaman perumahan untuk membeli dua unit pangsapuri Parcel 14 dan parcel 13, Sri Indah Apartments, Jalan Air Itam, Pulau Pinang. Kedua-dua pangsapuri tersebut bernilai RM110,000 setiap satu termasuk kos premium insuran. Pihak kami telah memproses dokumen-dokumen yang dikemukakan dan pinjaman berjumlah RM220,200 telah diluluskan dan dibayar sepenuhnya pada 7 December 2000 setelah mendapat surat pengesahan bertarikh 29 November 2000 dari peguam Tetuan Abbas & Ngan dari Ipoh. Dalam bulan February 2001 kami telah menyemak akaun pinjaman ini dan mendapati Pneh Kon San tidak dapat dikesan atau dihubungi. Semakan dengan Jabatan Pendaftaran Negara mendapati kad pengenalan yang digunakan oleh Pneh Kok San adalah kepunyaan LOO KOON YEOW dan dengan ini ternyata bahawa Pneh Kon San telah melakukan penipuan terhadap bank kami dan mengakibatkan kerugian sebanyak RM220,200.

(b) To recover the loss the respondent relies on the letter of instruction dated 18 October 2000 to assert that the loss or damage was caused by the appellant in particular for failing to do appropriate search, etc. *What is important to note is that the instruction to do searches is vague and what searches which must ordinarily be done will largely depend on conveyancing practice and inconseguence the evidence of the experts need to be considered to ascertain liability.* (Emphasis added.) The said letter exh P23, inter alia, reads as follows:

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P 23

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RHB BANK BERHAD (6171-M)
Business Credit Services Support
Perak Area Business Centre
2nd Floor, Lot 2,4,6 & 8
Jalan Tun Sambanthan
30000 Ipoh
Tel: 05-2432259/60 ext: 130/131/132
Fax: 05-2432804

Our Ref : JLP000203 & JLP000204 (Sri Indah Apartment)
Date : 18 OCT 2000

M/S Abbas & Ngan
Advocates & Solicitors
ABASAN HOUSE
38-40 Medan Istana 1
Bandar Ipoh Raya
30000 Ipoh Perak

Dear Sirs,

BORROWER/S	:	PNEH KON SAN
FACILITIES	:	1ST PARTY HOUSING LOAN OF RM110,100-00 EACH
TITLE/ADDRESS	:	(LADA) LEVEL 2 PARCEL 14 & LEVEL 3 PARCEL NO.13 SRI INDAH APARTMENTS, JLN AIR ITAM HELD UNDER MASTER TITLE H.S.(D) 2864 & 2865 LOT NOS. 4765 & 4766 RESPECTIVELY SECTION 6, TOWN OF GEORGETOWN, NORTH EAST DISTRICT, ~~PERANG~~. *Pulau*
LENDING BRANCH	:	JELAPANG
BRANCH ADDRESS	:	433 & 435 JALAN SILIBIN TAMAN SILIBIN 30760 JELAPANG, PERAK
FAX NO	:	05- 5282418

We have agreed to grant the abovementioned facility/ies to the abovenamed borrower(s) to be made available at our abovementioned branch, subject to the terms and conditions as stated therein our *Letter of Offer dated 06/10/00*, photocopy of which is enclosed herewith for your perusal.

We enclose herewith our standard * *Deed of Assignment/ Power Attorney ~~Facilities Agreement / Charge Annexure~~*. Kindly enclose a cheque for *RM120-00* payable to RHB BANK BERHAD.

Please attend to the necessary security documentation and ensure the document is drawn up to incorporate the terms and conditions stipulated in our Letter of Offer to the customer(s). As our solicitors, we would also expect your firm to prepare other relevant documents deem necessary to protect the Bank's interest.

Please also attend to the necessary searches and liaise with the Borrowers/Developer's Solicitors/Vendor/Vendor's Solicitors/Chargor/Chargee's Solicitor/Bridging Financier for further information/undertakings and relevant documents/Original Sale & Purchase/Title Deeds upon our undertaking to release the loan /redemption sum not exceeding the loan amount upon completion of security documentations and all legal formalities and subject to us in receipt of confirmation that the borrower has/have settled the difference between the purchase price and loan amount.

* We would appreciate that you could enclose photocopies of the relevant Title Deed (if applicable), NRIC of the borrowers and chargors as well.

Kindly liaise directly with the borrower(s) at tel no. 05-5486794 / 012-5516648 for any other information. Kindly also procure a photocopy of the Contractor's All Risk Insurance policy (where the project is under construction) or the Master Fire Insurance policy endorsing the Bank's name as chargee (where the project is completed) with respect to the abovementioned property.

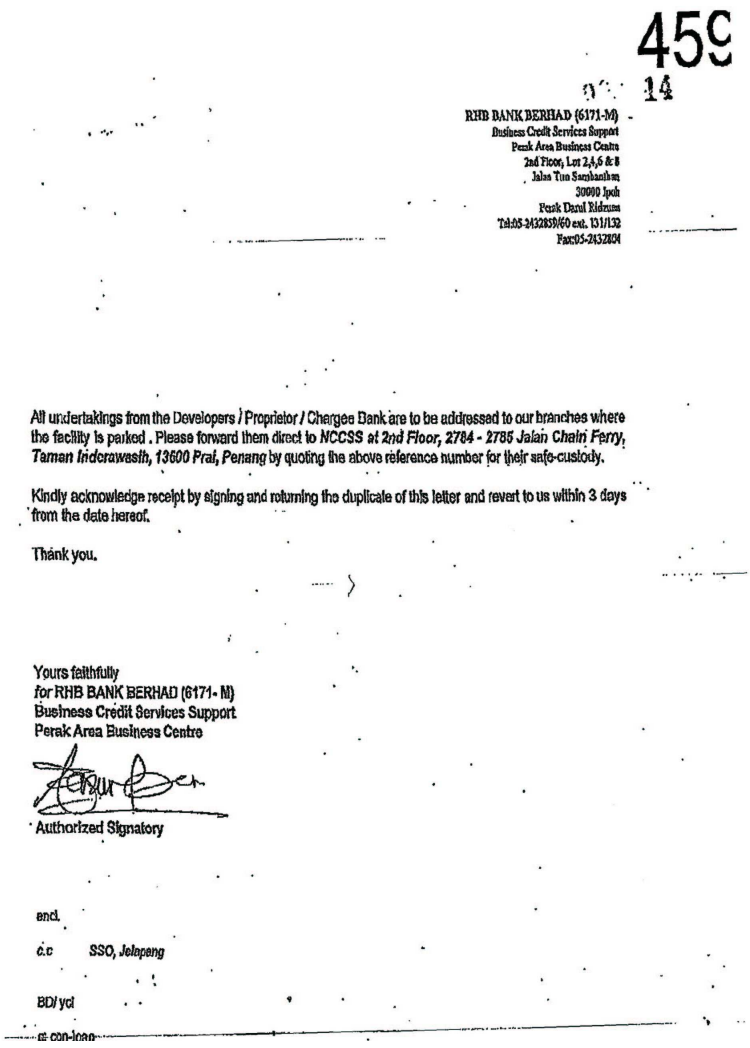
Please be informed that you are to attach a copy of the duly accepted Letter of Offer (all pages including appendices) to each of the Facilities Agreement & kindly also obtain the borrower/s initial on every page of the Letter of Offer during their execution of the Facility Agreement.

* You are to create an OPEN Charge (i.e. DO NOT indicate the loan amount on Form 16A) for 1st Party Charge.

Please take note that the turn around time to complete the documentation is 21 days from the day of receipt of this instruction letter.

* Delete whichever is not applicable.

1/2



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RHB BANK BERHAD (6171-M)
Business Credit Services Support
Perak Area Business Centre
2nd Floor, Lot 2,4,6 & 8
Jalan Tun Sambanthan
30000 Ipoh
Perak Darul Ridzuan
Tel:05-2432830/60 ext. 131/132
Fax:05-2432804

All undertakings from the Developers / Proprietor / Chargee Bank are to be addressed to our branches where the facility is parked . Please forward them direct to *NCCSS at 2nd Floor, 2784 - 2785 Jalan Chain Ferry, Taman Inderawasih, 13600 Prai, Penang* by quoting the above reference number for their safe-custody.

Kindly acknowledge receipt by signing and returning the duplicate of this letter and revert to us within 3 days from the date hereof.

Thank you.

Yours faithfully
for RHB BANK BERHAD (6171- M)
Business Credit Services Support
Perak Area Business Centre

Authorized Signatory

encl.

c.c SSO, Jelapang

BD/ycl

c: con-loan

(c) The respondent also relies on two undertaking letters (both similar) to find liability for the release of the loan sum. One of the said letters dated 17 November 2000 marked as exh P24, inter alia, reads as follows:

Your ref: JLP/00/0203 (SRI INDAH APARTMENT)

Our ref: 00/RHBSN/C8 (LEO)

Date: 17/11/2000

The Manager

RHB bank BERHAD

Northern Credit Services Support

2nd Floor, 2784 & 2785

Jalan Chain Ferry

Taman Inderawasih

13600 Prai, Penang.

Dear Sir,

Re: Housing Loan of RM110,000.00

F'g Pneh Kon San

We refer to the above and write to inform you as follows:-

[1] that the Deed of Assignment has been duly executed and witnessed;

[2] that the Facility Agreement has been duly executed and witnessed;

[3] that the Power of Attorney has been duly executed and filed at the Ipoh High Court;

[4] that we have conducted the bankruptcy search on the said borrower and the same is still pending at the bankruptcy office;

[5] that the Master Quit Rent Receipt for year 2000 has been paid till up to date;

[6] that there is no restriction endorsed or the Master Title Deed against the Transfer and Charge of the property to the Purchaser[s]/Borrower[s];

[7] that the difference between the Purchase Price and the loan sum have been duly settled by the Purchaser[s]/Borrower[s];

[8] that we have conducted a land search in respect of the Master Titled deed to the said property and that accordingly, the search revealed as follows:-

i. That the said property is held under Master Title No. HS(D) 2864 & 2865, Lot 4765 & 4766, Section 5, Town of Georgetown, North East District, Penang bearing address No. 492A-2-12A, Sri Indah Apartments, Jalan Air Itam, 11400 Penang.

We enclose herewith the following documents:

[a] an original copy of the Statutory Declaration for Ownership duly stamped.

[b] an original copy of the Statutory Declaration that the Borrower is not a bankrupt.

[c] an original copy of the Undertaking Letter from the developer dated 30 October 2000 stating the difference sum has been fully settled

[d] a photocopy of the Master Title Deed

[e] an original letter from the vendor dated 28 October 2000 stating the difference sum has been fully settled

[f] the original Sale and Purchase dated 15 July 2000 between the vendor and the Purchaser

[g] a copy of the master Quit Rent Receipt for the year 2000

[h] a copy of the Certificate of Fitness for Ownership

[i] letter from the vendor to Purchaser dated 15 November 2000 extending the completion date

[j] an original copy of the Facility Agreement and Deed Of Assignment duly stamped.

We are satisfied that all the documentation is in order and you may release the Loan Facility of RM110,000 made payable to Metro Development Sdn Bhd to us for our onward transmission to them.

We certify to the best of our knowledge and belief the documents in respect of the abovementioned facility comply with your bank's requirements and the interest of your bank is adequately protected.

We hereby undertake to indemnify you for any and all loss and damages that you may suffer due to our negligence and/or default to the extent RM110,000.

If you have query, please do not hesitate to get in touch with us.

Yours faithfully,

ABBAS & NGAN

Sgd

(d) What is necessary to note as far as the undertaking letter is concerned is that the appellant had confined his liability to negligence and/or default. It is not an open undertaking but the undertaking is subject to terms (see *Au Kong Weng v Bar Committee, Pahang* [1980] 2 MLJ 89).

(e) In addition, the said letter itself highlights unfinished business such as bankruptcy search. In consequence, the respondent is not obliged to release the said sum when it is apparent that the bankruptcy search or other searches which the respondent may desire and complains of in this suit, has not been done and will be risky to release the loan sum. If the underlying cause for liability is 'because the borrower was a bankrupt', etc; then the doctrine such as *volenti fit injuria* will come into play. However, if the said letter is an accepted norm for release of payment according to conveyancing practice then the appellant may be exonerated

from liability. The evidence of the expert will be essential to determine this issue. To say the appellant had 'assumed responsibility' pursuant to the said letter and the respondent has relied on the representation or misstatements cannot be totally correct within the parameters of accepted jurisprudence (see *Caparo Industries Plc v Dickman* [1990] 2 AC 605; *The Co-operative Central Bank Ltd v KGV & Associates Sdn Bhd* [2008] 2 MLJ 233).

(f) It was strenuously argued by the respondent that the failure of the appellant solicitor to do a search on the bogus solicitor was the material cause for the loss in contract as well as in negligence though it was not the pleaded case or specified in the instruction. Again this issue is one relating to conveyancing practice as was in vogue in the year 2000.

(g) In the year 2000 there was no requirement by the Bar Council to do search on solicitors. The experts who gave evidence did not say that this is a requirement. The English conveyancing practice, now in vogue, requires a search to be done on solicitors to avert conveyancing fraud. For example, there is heavy reliance by solicitors in England on the explicit duties which are prescribed by the Council of Mortgage Lenders (CML) Handbook (including the duty to check whether the solicitors for the other side is bogus or not) (see *Lloyds TSB Bank Plc v Markandan and Uddin (a firm)* [2012] EWCA Civ 65). The English standards cannot be imposed in Malaysia on a transaction which took place in the year 2000 that too in cases where there is no specific requirement in law or practice or by way of cliental instruction to do so (see *Nationwide Building Society v Davisons Solicitors (a firm)* [2002] All ER(D) 141 (Apr)).

[33] Conveyancing transaction has a number of risks. The risk element will be minimised if the solicitors as well as the sale and purchase agreement are not bogus. The appellant's expert witness without mincing words had in the witness statements set out the prevalent conveyancing practice, and focused on the relevant issues before the court and without mincing words had expressed the cause of the loss in paras 7 and 8.

[34] We have also gone through the respondent's expert evidence with great interest and gave much consideration to it. The respondent's evidence was much general in nature without much focus on the issue in hand; and did not consider the fact and also time factor and reliance of vendor and purchaser solicitors' role on search report and undertaking and its acceptance, where transaction in ordinary sale and purchase agreement has to be completed within 3 + 1 months. The time factor plays an important role in conveyancing practice and all searches and obligation may not have been completed within the specified time and in consequence there is also a need to rely on undertaking and is part and parcel of conveyancing practice. All these practices

have its risk but the risk elements are usually covered by insurance coverage as these are risks of the conveyancing industry itself.

[35] Though we agree with the respondent's expert evidence and the suggested personal opinion may be sound but in practical terms it will be difficult to achieve within specific time frame if reliance is not made on searches, representation and undertaking from the relevant solicitors including the developer, vendor or purchaser, etc. The learned trial judge's findings related to this issue read as follows:

> Mahkamah lebih bersetuju dengan pendapat SD2 mengenai standard of conveyancing practice. Lagi pun ia juga selaras dengan nas dalam kes *Midlands Bank Plc v Cox Mcqueen (a firm)* [1999] 1 FLR 1002 (CA) di muka surat 1010 E - F di mana Lord Woolf menyatakan:
>
> … if commercial institutions such as banks wish to impose an absolute liability on members of profession they should do so in clear terms so that the solicitors can appreciate the extent of their obligation which they are accepting.
>
> Malah nas daripada kes *Midlands* ini yang dijadikan nas dalam hujahan pihak Defendan.
>
> Walaubagaimana pun, fakta menunjukkan bahawa hanya SD1 iaitu Puan Chew Eng Cheng seorang sahaja yang semasa itu baru satu tahun beramal, diberikan tanggungjawab mengendalikan pendokumentasian sekuriti ini di firma Abbas & Ngan. Apa yang SD1 lakukan untuk pencarian dan verifikasi antara lain ialah:
>
> 1. Membuat carian mengenai hartanah dan kebankrapan (land search and bankruptcy search) terhadap PKS.
> 2. Menghubungi Tetuan KY Lee & Associates (yang tidak pernah dihubungi sebelum itu) bertanyakan sama ada boleh membantunya mendapatkan pengesahan dari pihak-pihak yang terlibat memandangkan KY Lee & Associates dan pihak-pihak lain memang berada di Pulau Pinang.
>
> Apabila diajukan soalan mengenai carian-carian lain untuk verifikasi, SD1 menjawab bahawa itu bukan amalan conveyancing biasa.
>
> Keterangan dari SD2 dan nas daripada kes Midland mengenai fungsi peguam yang mengendalikan dokumen sekuriti mengikut standard good conveyancing practice didapati ada pengecualiannya iaitu 'jika terdapat arahan-arahan tertentu dari pihak financier' dan 'they should do so in clear terms so that the solicitors can appreciate the extent of their obligation which they are accepting.'
>
> Berdasarkan prinsip pengecualian tersebut Mahkamah, setelah meneliti terma-terma dalam P23, mendapati bahawa fakta dalam kes ini termasuk di bawah pengecualian tersebut. Para 4 P23 berbunyi:
>
> Please also attend to the necessary searches and liase with the Borrowers/developer's solicitors/vendors solicitors etc for further information/undertaking and relevant documents/Original Sale and purchase/Title Deed upon our undertaking to release the loan …

> Mahkamah mendapati 'attending to the necessary searches' walaupun bersifat 'investigative' namun carian yang perlu untuk 'further information/ undertaking and relevant documents … upon undertaking to release the loan' adalah merupakan arahan tertentu, spesifik dan jelas kepada klien (financier) iaitu Plaintif dalam kes ini kepada Defendan demi menjaga dan melindungi kepentingannya dalam skop peranan dan tugas berkaitan dengan Defendan sebagai peguam yang beramal sebagai Peguam Mahkamah Tinggi dan menjadi panel plaintiff yang dilantik khusus untuk mengendalikan dokumentasi sekuriti pinjaman.

[36] In the instant case we are of the considered view that the learned judge was right in accepting SD2's evidence but erred when he found liability against the appellant when there was no specific instruction on related issues, more so when the letter of instruction as well as the pleadings were vague. For example, in *Midland Bank Plc v Cox McQueen (a firm)* [1999] 1 FLR 1002; [1999] Lloyd's Rep PN 223, the Court of Appeal considered the extent of obligation on solicitors when they are retained by a bank in connection with the execution of a charge. The bank's claim in the court below was under four different heads:

(a) negligence or breach of the implied duty to carry out the retainer with reasonable care and skill;

(b) breach of warranty of authority;

(c) non-performance of the retainer; and

(d) breach of the warranty contained in the certificate on the charge.

The bank's appeal was dismissed and Lord Woolf MR, inter alia, made the following observation:

> The features of the background which are of most significance are:
>
> (a) that the retainer was in connection with the bank obtaining security for a loan which in its commercial judgment the bank had decided to make to its customer, Mr Dukes. Risks are always associated with entering into such a transaction, even with a customer who is thought to be respectable. This is the type of risk for which a commercial body such as bank would make provision.
>
> (b) on the other hand the solicitors were being retained in their professional capacity to provide services to the bank. In the ordinary way solicitors are not required to take commercial risks of this nature. In the provision of services the normal standard of responsibility of solicitors, in the absence of any agreement to the contrary, is to exercise the standard of care which is normally to be expected from a competent member of the profession providing that service.
>
> (c) the bank would normally be in a better position than the solicitors to form a judgment as to the customer's trustworthiness.

> It is against this background that the question which Mr Norris accurately identified has to be objectively answered in order to determine this appeal. The question is, did the bank intend to ask for and did the solicitors intend to give a promise to answer for the fraud of the customer even if that fraud could not be detected by exercising all proper care? In my view the answer to the question should be no, unless the language used compellingly indicates otherwise.

[37] In addition, the learned trial judge had failed to deal with the issue of causation in the right perspective and failed to appreciate the test whether or not it is just on the facts to hold the appellant liable. The test requires a balance between proximity and remoteness. That is to say whether it was reasonably foreseeable at the relevant time that the behavior complained of would cause loss and damage of that type when the learned judge found liability against the appellant when there was no specific instruction on related issues, more so when the letter of instruction as well as the pleadings were vague. In *Lamb v Camden London Borough Council* [1981] QB 625, Lord Denning was candid on the issue of duty remoteness and causation. His Lordship observed:

> The truth is that all these three — duty, remoteness and causation — are all devices by which the courts limit the range of liability for negligence All these devices are useful in their way. But ultimately it is a question of policy for the judges to decide.

[38] The duty of care is seen higher for professionals and different consideration will apply to different profession. And the 'but for' test plays an important part. In the recent case of *Chua Seng Sam Realty Sdn Bhd v Say Chong Sdn Bhd & Ors and other appeals* [2013] 2 MLJ 29, the Court of Appeal on 'but for' test made the following observation:

> [44] In this regard, the 'but for' test is important in determining whether or not the defendants' act was the main factor causing the damage suffered by the plaintiffs'. The text in para 2-09 in Clerk & Lindsell states that:
>
> The first step in establishing a causation is to eliminate irrelevant causes, and this is the purpose of the 'but for' test. The courts are concerned, not to identify all of the possible causes of the particular incident, but with the effective cause of the resulting damage in order to assign responsibility to that damage. The 'but for' test asks: would the damage of which the claimant complains have occurred 'but for' the negligence (or other wrongdoing) of the defendant? The first step in establishing a causation is to eliminate irrelevant causes, and this is the purpose of the 'but for' test. The courts are concerned, not to identify all of the possible causes of the particular incident, but with the effective cause of the resulting damage in order to assign responsibility to that damage. The 'but for' test asks: would the damage of which the claimant complains have occurred 'but for' the negligence (or other wrongdoing) of the defendant?

[39] When issues relating to duty of care is inextricably entwined with issues

like remoteness and causation, the courts to do justice to the parties conduct an evaluative weighing process rather than set out a clear cut rule of law (see *Holling v Yorkshire Traction Co Ltd* [1948] 2 All ER 662]. The learned authors of Ramaswamy Iyers *'The Law of Torts'* (10th Ed), Lexis Nexis Butterworth on this issue has this to say:

> We shall now proceed to refer to certain tests of causation considered in the case-law.
>
> (1) A person becomes liable for the harm complained of, if his conduct is the proximate cause of it.
>
> (2) He becomes liable if his conduct is the direct cause of the harm or the harm is the direct consequence of his conduct.
>
> (3) He becomes liable if he could have, as a reasonable man foreseen such harm or considered it as probable. In other words, the tests are proximity, directness, and foreseeability or probability.
>
> The third test has now the support of high judicial authority in England and the other two may be regarded as unacceptable.

[40] The basic test for establishing causation is the 'but for' test in which the defendant will be liable only if the claimant's damage would not have accrued but for his negligence. From the evidence of SD2 it is clear that the appellant is not the proximate cause of the injury or direct cause or the loss was not foreseeable or probable. And is also not liable in contract or negligence. The most striking part of his evidence in relation to liability is set out in paras 7 and 8 which will satisfy the 'but for' test of causation (see *The Empire Jamaica* [1955] 1 All ER 452).

[41] The complaint of the appellant and the respondent in the instant case is one relating to conveyancing practice. We have carefully examined the complaints and the judgment and the evidence. We are satisfied that the learned trial judge had misdirected himself on the issue of liability as averred by the appellant. In the instant case, we are satisfied that the learned judge had not directed his mind to the relevant issues in the right perspective and had not acted according to law and decision does not pass the acid test of reasonableness (see *Kyros International Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2013] 2 MLJ 650; *Damusa Sdn Bhd v MRCB Prasarana Sdn Bhd* [2012 MLJU 795; [2012] 1 LNS 994).

[42] For various reasons stated above, we are of the considered view that it is a fit and proper case to allow the appeal with costs. The judgment of the High Court is set aside.

We hereby order so.

Varghese George JCA (dissenting):

INTRODUCTION

[43] The appeal before us was only in respect of that part of the judgment of the learned judicial commissioner of the 12 May 2011 which had held that the appellant '…telah melakukan pecah kontrak (breach of contract; dan gagal melaksanakan kewajipan berjaga-jaga (duty of care) terhadap…' the respondent.

[44] The respondent/plaintiff was a licensed bank who had commenced the suit against the partners (at the material time) of a firm of solicitors, Messrs Abbas & Ngan. The appellant/defendant was the surviving of those partners in the action, the name of the others having been struck out previously.

[45] For ease of reference and for better appreciation of the context in which the various issues have arisen and had been considered at the trial, and also before us, the appellant will be referred as 'the Firm', while the respondent as 'the bank' in this judgment.

THE BACKGROUND — MATERIAL FACTS

[46] The firm was on the bank's panel of solicitors.

[47] The bank had approved two housing loans each in the sum of RM110,000 to a borrower, Pneh Kon San ('Pneh') to complete the purchase of two units of apartments at Sri Indah Apartments ('the properties') from a vendor, Metro Development Sdn Bhd ('Metro Development').

[48] On 18 October 2000 the bank appointed and instructed the firm to prepare the loan security documents in respect of the facilities granted to Pneh (P23). The whole of P23 is reproduced and attached as a schedule to this judgment.

Amongst the other documents forwarded to the firm by the bank at that time were:

(a) a copy of the bank's offer letter of 6 October 2000 (P7) which had been accepted by Pneh on 13 October 2000;

(b) what was stated to be the respective sale and purchase agreements between Metro Development and Pneh (P4, P5) in respect of the properties; and

A (c) photocopy of the identity card of Pneh (D22) bearing IC No 560219–07–5667 (Old IC No 5142556).

[49] As could be gathered from P4 and P5, no separate strata titles to the properties had as yet been issued.

B The developer of the properties was one Lip Sin Company Sdn Bhd (the developer) and apparently Metro Development had by 'sale and purchase agreements) dated 23 February 1999' purchased the properties from the developer.

C **[50]** In the circumstances the transaction between Metro Development and Pneh was a 'subsale' and the bank was the financier of this subsale.

The solicitors attending to this 'subsale' transaction was another firm of solicitors stated to be one, Messrs KY Lee & Associates.

D **[51]** On 17 November 2000, the Firm wrote to the bank (P24, P25) and materially made the following express representations:

…

E …

We are satisfied that all the documentation is in order and you may release the Loan Facility of RM100,000 made payable to Metro Development Sdn Bhd to us for our onward transmission to them.

F We certify to the best of our knowledge and belief, the documents in respect of the abovementioned facility comply with your bank's requirements *and the interest of your bank is adequately protected.*

We hereby undertake to indemnify you for any and all loss and damages that you may suffer due to our negligence and/or default to the extent of RM110,000.

G …

(Emphasis added.)

H **[52]** The bank then on 7 December 2000 released cheques for the loan sum (less deduction for MRTA premium), which were made out in favour of Metro Development but forwarded to the firm for onward transmission.

[53] Pneh subsequently defaulted in the repayment of the bank's facilities I and it was then discovered by the bank that:

(a) Pneh had a fictitious identity;

(b) Metro Development was never the beneficial owner of the properties; and

(c) Messrs KY Lee & Associates was a bogus legal firm.

It was established in evidence that the purported old Identity Card No of Pneh in fact referred to some other (Loo Koon Yeow) and that the beneficial owners of the properties was one Poh Teh Realty Sdn Bhd (who had purchased the properties from the developer).

[54] The bank then commenced proceedings against the partners of the Firm. The firm inturn brought a counterclaim against the bank (and Messrs Asbir, Hira Singh & Co, who were subsequently struck out) for RM10m for malicious proceedings.

[55] The High Court allowed the bank's claim and dismissed the firm's counterclaim. There was no appeal by the firm against the dismissal of their counterclaim.

AT THE HIGH COURT

[56] The bank's action was for losses and damages suffered as a result of the firm's breach of contractual obligations and/or in the tort of negligence for breach of duty or standard of care and skill as was expected of a similar professional.

[57] After hearing seven witnesses for the bank and two witnesses for the firm (which included SP7 and SD2, who were disinterested senior legal practitioners as regards the procedures and conveyancing practice) the learned judicial commissioner allowed the bank's claim.

[58] The trial judge was of the view that the foundation of the bank's claim in contract and/or in tort was P23, the letter of instruction or retainer of 18 October 2000.

His Lordship went on to observe:

> Daripada kandungan P23 terma terma pelantikan yang jelas ialah:
>
> (i) defendan bertanggungjawab untuk berhubung dengan pihak-pihak yang perlu dan relevan bagi mendapatkan maklumat lanjut yang perlu termasuk peguam-peguam pemaju serta vendor (penjual) dan untuk mendapatkan dokumen asal
>
> (ii) defendan bertanggungjawab untuk membuat carian-carian yang perlu, dan
>
> (iii) defendan bertanggungjawab menyediakan dokumen-dokumen lanjut yang semuanya bagi menjamin pelindungan yang munasabah dan mencukupi kepada klien (Plaintif) dan memastikan dokumen-dokumen undang-undang yang disediakan sah dan dapat dikuatkuasakan sebelum pinjaman tersebut dapat dilepaskan.

A

> Daripada P23 juga Mahkamah mendapati bahawa secara tersirat pihak plaintiff mengharapkan Defendan mendapatkan maklumat yang tepat melalui perhubungan dan carian-carian tersebut.
>
> Dengan itu dari segi kontrak, defendan mestilah melunaskan kehendak plaintif seperti yang jelas dari terma-terma tersebut tanpa mungkir.

B

> 2. Berdasarkan tanggungjawab yang terletak atas defendan melalui P23, Defendan sebagai orang yang mempunyai ikhtisas (professionalisma) dianggap (dari segi tort) sebagai pihak yang mempunyai kemahiran khusus (special skill) yang bertanggungjawab memastikan kepentingan Plaintif terpelihara dan dokumen-dokumen sekuriti yang disediakan adalah yang sah di sisi undang-undang dan boleh dikuatkuasakan.

C

[59] His Lordship then analysed the evidence of SP7 (Low Beng Choo) called by the bank and SD2 (Yeo Yang Poh) as to good conveyancing practice and noted as follows:

D

> SP7 juga menegaskan bahawa menjadi tanggungjawab peguam yang mengendalikan dokumentasi sekuriti membuat carian dan pengesahan sendiri secara bebas sebelum menasihatkan Klien untuk melepaskan pinjaman.

E

> SD2 tidak sependapat dengan SP7 mengenai langkah-langkah yang dinyatakannya itu yang patut dilakukan oleh seorang peguam sebagai good conveyancing practice,
>
> Pada pendapat SD2, dalam keadaan di mana peguam bertindak untuk pembiaya (financier) bukannya peminjam (borrower) seperti dalam kes ini, tanggungjawab peguam hanyalah melakukan sesuatu yang berkaitan dengan penyediaan dokumen pinjaman sahaja. Peguam tidak diperlukan untuk mengambil perhatian kepada perkara-perkara yang berkaitan dengan jual beli. Baginya, peguam hanya bertanggungjawab dalam perkara yang bersifat undang-undang (legal) bukannya yang bersifat menyiasat (investigative). Pada pendapatnya peguam tidak perlu menyiasat dan menyemak apa yang telah dilakukan berkaitan dengan jual beli. Baginya, selagi tiada sesuatu sebab yang munasabah untuk diragui atau dicurigai peguam boleh hanya menerima apa yang dibuat dan bermula dari situ. Pendeknya mengikut SD2 peguam pembiaya (financier solicitor) boleh hanya bergantung kepada dokumen, maklumat dan pengesahan oleh sales and purchase solicitor sahaja. Malah bagi SD2, untuk melakukan carian dan pengesahan seperti yang dinyatakan oleh SP7 akan menjadikan amalan conveyancing sebagai extremely cumbersome and impractical kerana langkah-langkah yang wajar diambil untuk mengelak dari penipuan tidak akan ada hujungnya. Tetapi beliau menegaskan bahawa standard tersebut ada pengecualiannya iaitu jika terdapat arahan-arahan tertentu (specific Instructions) dari pihak klien (financier).

F

G

H

I

> Mahkamah lebih bersetuju dengan pendapat SD2 mengenai standard of conveyancing practice, lagipun ia juga selaras dengan nas dalam kes *Midland Bank Plc v Cox McQueen (a firm)* [1999] 1 FLR 1002 (CA) …

And further:

Keterangan dari SD2 dan nas daripada kes *Midland* mengenai fungsi peguam yang mengendalikan dokumen sekuriti mengikut standard good conveyancing practice didapati ada pengecualiannya iaitu 'jika terdapat arahan-arahan tertentu dari pihak financier' dan 'they should do so in clear terms so that the solicitors can appreciate the extent of their obligation which they are accepting'.

Berdasarkan prinsip pengeculian tersebut Mahkamah, setelah meneliti terma-terma dalam P23, mendapati bahawa fakta dalam kes ini termasuk dibawah pengeculian tersebut …

[60] His Lordship then assessed the evidence before the court and noted:

Walaubagaimana pun, fakta menunjukkan bahawa hanya SD1 iaitu Puan Chew Eng Cheng seorang sahaja yang semasa itu baru satu tahun beramal, diberikan tanggungjawab mengendalikan pendokumentasian sekuriti ini di firma Abbas & Ngan. Apa yang SD1 lakukan untuk pencarian dan verifikasi antara lain ialah: …

And more materially the trial judge went on to state:

Bila dikaitkan fakta penipuan oleh PKS (Pneh) dengan tugas dan tanggungjawab Defendan dari segi kontrak dan tort, didapati bahawa:

(a) Sekiranya SD1 melakukan carian untuk mendapatkan maklumat mengenai Lip Sin dan Metro dari Suruhanjaya Syarikat Malaysia (SSM) sudah tentu akan didapati alamat Lip Sin yang dibekalkan oleh PKS adalah salah dan Defendan akan dapat menghubungi Lip Sin di alamatnya yang sebenar. Seterusnya akan didapati Lip Sin & Company sebenarnya tidak pernah menjual dua apartment tersebut kepada Metro dan Metro bukan tuan punya benefisialnya. Dengan itu sudah tentu Metro akan didapati tidak boleh memindahmilik apartment tersebut kepada PKS.

(b) Jika carian dibuat, Lip Sin tentu akan dapat dihubungi di alamatnya yang sebenar atau dihubungi oleh SD1 melalui saluran yang betul dan akan didapati Metro adalah sebuah Syarikat dormant dan fakta mengenai kuasa orang yang menandatangani dokumen perjanjian jual beli akan diperoleh sendiri yang sudah tentu akan timbul keraguan pada SD1 ke atas statusnya sebagai signatory. Di samping itu sekiranya buku panduan telefon peguam-peguam yang beramal yang dibekalkan oleh Majlis Peguam (P104) diteliti dan Majlis Peguam sendiri dihubungi, sudah tentu akan diketahui bahawa Lee Kon Yew bukanlah peguam yang beramal.

Dengan kegagalan SD1 mengendalikan carian terutamanya dengan SSM mengenai Lip Sin Co and Metro adalah didapati pihak defendan telah gagal memenuhi permintaan jelas oleh plaintif melalui P23 untuk:

(i) membuat carian maklumat sebenar mengenai Lip Sin dan Metro;

(ii) menentukan bahawa Metro adalah benar-benar tuanpunya benefisial kepada dua buah apartment tersebut sebelum Defendan menyediakan dan menyempurnakan dokumen pinjaman, dan

(iii) mengesan kuasa penandatangan kepada deed of assignment iaitu Ang Poon Soon sebagai Pengurus Besar Syarikat Lip Sin.

A Dengan kegagalan-kegagalan tersebut Mahkamah mendapati Defendan telah gagal mempastikan dokumentasi sekuriti yang disediakannya adalah sah dan boleh dikuatkuasakan oleh Plaintif.

…

B …

Keperluan P23 bukan sekadar membuat carian mengenai tanah dan kebangkrapan PKS sahaja, tetapi menghendaki carian yang munasabah sesuai dengan tanggungjawab professionalfisma Defendan dalam kontrak dan tort untuk menjaga kepentingan Plaintif,

C

THE FIRM'S APPEAL

D

[61] Before us it was argued for the firm that the trial judge had erred when it was held that the instruction of retainer issued was in the nature of a 'specific instruction'. It was contended that the contents of P23 were only general instructions and vague as well, to impose any specific obligation or duty on the
E firm to go beyond the documents forwarded by the bank to the firm.

[62] It was also contended for the firm that the bank had assumed the risk of genuineness that lay behind the sale and purchase agreements between Pneh and Metro Development when the bank forwarded the said documents to the
F firm. Accordingly, the principle of 'volunti non fit injuria' operated against the bank.

[63] Thirdly, it was submitted that the loss suffered by the bank were caused
G by extraneous or intervening factors, namely fraud by Pneh, which were beyond the control of both parties and accordingly the firm ought not to be made liable for the same.

[64] Counsel for the appellant conceded that there was no check made with
H the developer and further no company searches were undertaken at SSM in respect of both the developer and/or Metro Development, at all.

Learned counsel also maintained that conveyancing practise at the material time did not require a search to be made in respect of the legal firm of Messrs
I KY Lee & Associates or any particular lawyer who claimed to be practising in that firm.

[65] Further, it was also conceded by counsel (as borne out in the firm's letter of 17 November 2000) that the bankruptcy search on Pneh was still pending at

the time of the advise by the firm that the loan could be released.

THE BANK'S SUBMISSIONS

[66] It was the response of counsel for the bank that though the instruction letter or retainer ('P23') were couched widely, there was a specific direction or instruction therein for the firm to liaise with the developer's solicitors. In any event this was the practice when the context here was creation of a 'security' based on a subsale where no separate strata title in respect of the properties was as yet available. The firm had admittedly failed to carry out the specific direction.

[67] It was also argued by counsel for the bank that the source of the title for the properties (provided as securities to the bank) was the developer and as the bank's (the financier) solicitors, the firm was duty bound to enquire and confirm that the transaction between Metro developer (the vendor) and Pneh (the purchaser) were genuine. The fraud or deceit subsequently discovered could have been detected if a check with the developer or developer's solicitors was carried out by the firm before finalisation of the security documentation.

A company search on the developer could have easily disclosed the correct address and details of their current directors of the developer and the 'fraud' now perpetrated would have become evident to the firm and consequently the bank's security would not have been jeopardised.

[68] Accordingly, it was submitted that notwithstanding the argument that the loss or injury to the bank could be attributed to two or more causes (as in the situation obtaining here), it was in this case the failure or omission of the firm to check out with the developer as to the genuineness of the purported sale to Metro Development that was the material cause, or the effective and dominant cause for the loss incurred by the bank.

[69] It was stressed by counsel for the bank, that the firm was negligent in any event in leaving the conduct of the instruction by the bank with a solicitor of limited (one year) experience and that the sole witness from the firm ('SD1') had admitted to her lapses.

Our attention was drawn in that respect to the evidence of SD1 (Chew Eng Cheng) which amongst others, were to the following effect (at p 179/180 of notes of proceedings):

> PL2: Tetapi soalan saya, Cik Chew, adalah berdasarkan P-23 dan 081, adakah anda bersetuju bahawa arahan Qik Chew khususnya adalah berhubung secara langsung dengan pemaju atau peguam pemaju, Lip Sin atau peguam Lip Sin, bukan KY Leetk Associates?

SD1: Berdasarkan arahan dari RHB bank dokumen patut dihantar kepada pemaju.

PL2: So, setuju?

DF1: Which setuju? J, D-81?

PL2: Setuju bahawa arahan khusus bank adalah untuk berhubung secara langsung dengan pemaju atau peguam pemaju, bukan KY Lee & Associates.

SD1: Setuju

[70] It was therefore submitted for the bank that the trial judge did not also err on the totality of evidence before the court, in coming to the conclusion that the firm was liable to the bank in the particular circumstances of this case.

MY ASSESSMENT

[71] In my assessment there were three principal questions raised in this appeal. They were:

(a) whether the bank's instructions to the firm (or retainer as it is also referred) included a specific direction that the firm was required to directly liaise with the developer's solicitors, thereby in effect to check out the validity or regularity of Metro Development's claim that the latter was the purchaser of the properties from the developer;

(b) what was the extent of the obligations (contractual) and the duty of care (in tort) owed by the firm to the bank and whether these had been breached by the firm; and

(c) whether the dominant and effective cause for the losses suffered by the bank was the breach or failure of the firm in not contacting the developer or the developer's solicitors.

SPECIFIC INSTRUCTION IN THE RETAINER

[72] As submitted by counsel for the bank it was undeniable that there was an express and specific instruction by the bank to the firm to liaise as well with the 'developer's solicitor' amongst other parties. At paras 3 and 4 of P23 we find the following:

> Please attend to the necessary security documentation and ensure the document is drawn up to incorporate the terms and conditions stipulated in our Letter of Offer to the customer(s). *As our solicitors,* we would also expect your firm to prepare other relevant documents deem necessary *to protect the bank's interest*

Please also attend to the necessary searches *and liaise with* the Borrowers/*developer's solicitors*/vendor/vendor's solicitors/Chargor/ Chargee's solicitor/Bridging Financier for further information/ undertaking and *relevant documents/Original Sale & Purchase*/Title Deeds upon our Undertaking to release the loan/redemption sum not exceeding the loan amount upon completion of security documentations and all legal formalities and subject to us in receipt of confirmation that the borrower has/have settled the difference between the purchase price and loan amount.

(Emphasis added.)

[73] It need to be noted that from the contents of P23, the only waiver by the bank was as to the lodgement of any private caveat on the properties (that is, on the master title to the land where the apartments were erected).

[74] Given the specific context of this case, where there were no separate individual title(s) available to the properties, the significance of the developer's confirmation and the obtaining of the original sale and purchase agreement between the developer and Metro Development (as opposed to the immediate subsale and purchase agreement between Metro Development and Pneh already forwarded by the bank to the firm) cannot be overstated. The source of the 'title' to the properties was the developer. This was the reason why the instruction to liaise with developer's solicitors and obtain the original sale and purchase agreement were included in the retainer. To be also borne in mind was the expressed objective behind the security documentation to be drawn up, namely that it was intended to protect the bank's interest.

[75] Even analysing para 4 further, it was my view that the instructions to … *attend to the necessary searches and liase with the Borrowers/developer's solicitors/vendor/vendor's solicitors/ Chargor/Chargee's solicitors/Bridging Financier for further information/undertakings* … did not give rise to any ambiguity, vagueness or confusion.

Here it was clear that:

(a) 'borrower/solicitors' meant Pneh and his solicitors in this case.

(b) vendor/vendor's solicitors' meant Metro Development and their solicitors in this case.

(c) 'chargor/chargee's solicitors' meant Metro Development and if Metro Development's purchase was inturn financed previously, such financier of Metro Development who had a 'security' arrangement over the properties (in this scenario by a 'loan agreement cum assignment' perhaps).

(d) 'bridging financier' meant any bank who had provided bridging facilities usually to the developer (pending completion of the project and sale of the various units/house in the project); if applicable.

[76] The parties or entities named were relevant and in no way superfluous in the light of the objective that the bank's interest was protected and the security created in favour of the bank was enforceable should there be a default on the terms of the facilities. This would have been obvious to a lawyer handling conveyancing matters.

[77] There was no necessity for deletion of any of those parties or entities listed there. Each of them mattered and had to be checked or cleared in the context of this subsale transaction to ultimately safeguard and protect the bank's interest over the properties taken as security.

[78] In my view, it was expected of the firm to study the overall situation in the context of this case and in order to protect the bank's interest before any documentation was attended to, the firm was to take steps to obtain relevant documents, confirmations, all necessary information and undertakings (as may be required) from those parties whose interest might likely conflict or impede the bank's outright security over the properties, as was intended and instructed,

[79] The trial judge, in my assessment, was not in error therefore to have concluded that there were specific instructions (arahan-arahan tertentu) for the bank to liaise with the developer's solicitors and this was to verify the very basis and propriety of the transaction claimed by Metro Development (as purchaser of the properties from the developer), before Metro Development could dispose of the properties to Pneh.

[80] The instructions to take such steps and act in such manner as to protect the bank's interest could only mean that the integrity and efficacy of the security documents was to be ensured in absolute terms before the firm was to advise the bank to release the loan sum.

THE FIRM'S OBLIGATION/DUTY

[81] It flowed from the above and undeniably so, that the firm's obligations or duty to the bank was in this case, more than 'managerial', namely, filling in the 'blanks' in the security documents (nowadays the 'standard form' documents being supplied by the financial institution concerned). It might not be too accurate on the other hand perhaps to term the extent of that obligation as being 'investigative' but it was clearly incumbent upon the firm to ensure the efficacy of the security documentation in so far it would protect the interest of the bank as the financier of the purported sale and purchase between Metro Development and Pneh with the security to be held by the bank being the properties themselves. This was clearly spelt out in or deducible from P23.

[82] It is significant that this role and scope of expertise expected of the firm

was acknowledged by the firm itself when in the subsequent letter authorising release of the loan-sums (of 17 November 2000, P24, P25), the firm went on to state that '… the documents in respect of the abovement'ioned facility comply with your bank's requirement and the interest of your bank is adequately protected'.

[83] The bank led evidence through SP7 as to the good and prudent conveyancing practice required with particular reference to security documentation to be undertaken to protect a financier's interest where no strata title was yet available. In her evidence-in-chief, she testified, inter alia, as follows:

> Q/A7
>
> A. The documents necessary would include the following:
>
> …
>
> …
>
> 7.9. consent and certain confirmation and undertaking from the proprietor and developer pertaining to the vendor's ownership of the apartment, and for delivery of a relevant transfer and the strata title upon issuance of such strata title.

And,

> Q/A8
>
> A. The searches and steps necessary would include the following:-
>
> …
>
> …
>
> …
>
> 8.4. to obtain custody of the original of the sale purchase agreement pertaining to the apartment made between the proprietor, the developer, and the vendor as the first-original purchaser thereof. If the apartment has been assigned by the vendor to the vendor's financier, then this should be obtained from the vendor's financier upon a full and complete redemption of the apartment;
>
> …
>
> …
>
> 8.9. to obtain certain confirmation and undertakings from the proprietor and developer pertaining to the vendor's ownership of the apartment, and also an undertaking for delivery of a relevant transfer and the strata title upon issuance of such strata title;
>
> …

A …

(Note: The reference vendor' in our context relate to Metro Development).

B **[84]** The significance of carrying out searches with the Companies Commission of Malaysia and the Official Assignee/Official Receiver on the developer, proprietor and vendor (the first purchaser) was also testified to by this witness. This was for purposes of being apprised of the respective legal status then of those parties and to obtain particulars including current information related to the directors and also the registered/business address, especially in the case of a company.

C

[85] It need to be noted that SP2 (SD2) in his testimony onjy stated that no investigative search on 'the borrower' (Pneh here) need be undertaken by the firm unless there was specific instructions to do so.

D

His evidence-in-chief to that effect is reproduced here:

10 Q: When the solicitor in the defendant firm relied and acted on documents forwarded to them by the plaintiff on its volition, is it the duty of the defendant to do investigative searches on the Borrower?

E

A: No. Unless there is specific instruction to do so.

The search on the 'borrower' (Pneh) was not the issue here.

F **[86]** SD2 did not however in his evidence-in-chief address the express instructions in P23 which required the firm to liaise with the developer's solicitors (vis a vis his testimony that prudent conveyancing practice does not require searches unless instructed).

G However when cross-examined on this point with respect to the 'specific instruction' he had this to say:

PL1 : Now, coming to the proprietor developer, in this case the proprietor and developer were one and the same person. Do you say that you still do not require a search from the Official Receiver and the Companies Commission of Malaysia on this?

H

SD2 : Yes, for same reasons that I have explained just now. I do.

PL1 : Now, would you not say that the bank's letter of instructions which were referred to you. P-23, YA. If you were to read paragraph 4, can you?

I

SD2 : Yes.

'reads'

PL1 : 'Please attend to the necessary security documentation and ensure the documentation is drawn up to incorporate the terms conditions stated in our letter of offer to the customer'. The next sentence, YA 'As our

solicitors, we also expect your firm to prepare other relevant documents deem necessary to protect the bank's interest', going on from there, 'please also attend to the necessary searches and liaise with the borrowers, developers, solicitors, vendor/vendor solicitors, etc for further information, undertakings and relevant documents'. But don't you think, Mr Yeo Yang Poh, that to be able to communicate with the proprietor developer, you would want to know the correct address when you write to them, because the developer in this case is not represented by solicitors.

SD2 : If there's knowledge that the developer was represented then of course *the right thing to do was correspond or write to developer's solicitors, that's the normal practice.*

JC : There's no lawyer.

SD2 : If there's no lawyer, I'm coming to that, YA. *If there's no lawyer, then write to the developer directly based on their address that is shown on documents that is in your record.*

PL1 : Mr Yeo, I put it to you that you would've to do a Companies Commission search on the proprietor developer for 2 reasons. One, to find out their various addresses, two, as regards who are the directors and officers of the company.

SD2 : No, I disagree with that. Sometimes, for example the company search will definitely show a registered address, and sometimes it also shows business address, but that company or that developer might actually have a different, a 3rd address from which to operate, such as a sales office. So, there is no, nothing to show, even if the developer uses an address that is different from what is shown on the CCM search. *Again, I understand YA, that if you look back from what has happened, I agree it would've been useful to make a CCM search in the circumstances of this case because of a deliberate fraud planned and perpetrated on the bank*, but if you ask me what is the normal conveyancing practice, normal conveyancing practice is not judged from hindsight, after knowing everything that happened in a case. That is not what I would call a normal conveyancing practice.

(Emphasis added.)

[87] Irrespective of whether it was specifically instructed, or in foresight or by hindsight, in my evaluation, it was SD2's evidence too that a search or enquiry with the developer even at the known or given address would have been useful to forestall the 'fraud' being carried to its fruition as had taken place in this instant case.

[88] I therefore agreed with submissions of counsel for the bank that, although the trial judge preferred a lower standard of care and skill as advocated by SD2 (as against what was considered as 'cumbersome and impractical'

conveyancing practice as testified for by SP7, so to speak), the crux of the question, as also held by the trial judge, was whether there was or not, an explicit instructions to carry out necessary searches and liaise with the developer or their solicitors.

[89] In this case there was such an express instructions and which admittedly had not been complied with by DW1, the solicitor attending to the matter at the firm.

[90] In *Midland Bank Plc v Cox Mc Queen (a firm)* [1999] 1 FLR 1002 (CA), the bank had originally advanced its case under four different heads, namely:

(a) negligence or breach of the implied duty to carry out the retainer with reasonable care and skill;

(b) breach of warranty of authority;

(c) non-performance of the retainer; and

(d) breach of the warranty contained in the certificate on the charge.

[91] The argument of the bank on appeal there proceeded primarily based only on the alleged non-performance by the solicitors of their retainer (see p 1004 of the report).

[92] L Woolf MR observed there that:

> If commercial institutions such as banks wish to impose an absolute liability on members of a profession they should do so in clear terms so that the solicitors can appreciate the extent of their obligation which they are accepting …

[93] The above principle of law was applied in *UCB Corporate Service Ltd v Clyde & Co (a firm)* [2000] 2 All ER (Comm) 257(CA), where in that case the terms of the bank's written instructions did not impose an absolute obligations on the solicitors to obtain an enforceable guarantee. They merely required that the solicitors should do all that could be reasonably expected of the solicitors to achieve the desired result, that is, the familiar implied duty to use professional skill and care. It was noted there that although the purpose of the bank's standard conditions might well have been to impose an absolute liability, if it had wished to impose an absolute liability it should have done so in clear and unequivocal terms. A bank which sought to ensure that its solicitors would assume the role of insurer against a failure to reduce its security had to put the solicitors into a position where they were able to withdraw from providing such services or to charge for them at a suitable commercial rate to take account of the risk (per Otton LJ at pp 268–269).

[94] In *Midland Bank Trust Co Ltd v Hett Stubs & Kemp* [1978] 3 All ER 571, Oliver J in commenting on duties owed by a solicitor (in that case in drawing up an option to purchase land) observed as follows:

> Now no doubt the duties owed by a solicitor to his client are high, in the sense that he holds himself out as practising a highly skilled and exacting profession, but I think that the court must beware of imposing on solcitors, or on professional men In other spheres, duties which go beyond the scope of what they are requested and undertake to do. It may be that a particularly meticulous and conscientious practitioner would, in this client's general interests, take it on himself to pursue a line of enquiry beyond the strict limits comprehended by his instructions. But that is not the test. The test is what the reasonably competent practitioner would do having regard to the standard normally adopted in his profession, and cases such as *Duchess of Argyll v Beuselincky*, *Griffiths v Evans* and *Hall v Meyrick* demonstrate that the duty is directly related to the confines of the retainer.

[95] I should pause here to stress again that in this instant case before us on appeal, as rightfully appreciated by the trial judge, there was however clear instructions to liaise with the developer's solicitors and the objective of the security documentation was expressly made known to the firm by the bank (vide P23), namely that it had to protect the bank's interest as financier for Pneh to complete the purported subsale.

[96] Further, the bank's action brought against the firm was not merely in contract for breach of the retainer but also in the tort of negligence as well. This clearly required the firm to discharge its duty of care owed to the bank (as discernable from all the relevant circumstances of the case) with reasonable skill and professionalism (as solicitors) to protect the bank's interest to ensure the efficacy of the security documentation.

[97] As highlighted by me earlier, the trial judge was not wrong in holding that if a search had been made on the developer it would have led to the discovery of the correct address of the developer and consequently the firm would have been able to liaise with the developer and/or the developer's solicitors to uncover the 'bogusness' surrounding the so called Metro Development's interest in the properties. The 'fraud' that was attached to the purported 'sale and purchase agreement' between Metro Development and Pneh could have been definitely detected if only the firm carried out the specific instructions of the bank and/or discharged its duty of care to the bank with the necessary skill and care required of a legal firm acting for the financier, the bank.

[98] A search on the developer at SSM ('CCM') if it had been conducted would have also unearthed the fact that the purported director of the developer who had signed the purported 'sale and purchase agreement' between Metro

Development and Pneh and/or the consent to the 'assignment' on behalf of the developer, was a deceased person and no longer a director of the developer at the material time. This would have been a further lead to suspect that something was not right or in place in Metro Development posturing as the vendor of the properties in the sale to Pneh (as it was claimed).

'BUT FOR' THE BREACH OF THE FIRM, THE BANK WOULD NOT HAVE SUFFERED LOSS

[99] There was no appeal against the quantum of damages ordered by the trial judge.

However it was contended before us for the firm that it was not the omission of lapses of the firm that were the direct cause of the loss suffered by the bank. It was argued that the firm ought not to be held liable as the loss in this case was occasioned by extraneous events amounting to a 'fraud' unknown to both parties.

[100] It was trite that firstly a causative link had to be established if a plaintiff was to succeed on a claim for damages. Further the damages had to be shown to be foreseeable and not remote. There was also no dispute that the law imposed a stricter or higher standard when the issue centered on the contractual obligation or duty of care owed by a professional to a client who had engaged their services and relied on the expertise of such a professional.

[101] The Court of Appeal in the recent case of *Chua Seng Sam Realty Sdn Bhd v Say Chong Sdn Bhd & Ors (and other appeals)* [2013] 2 MLJ 29, approved of the 'but for' test in such determination as to who should be held liable.

Mohd Hishamudin JCA in the judgment there noted:

> [32] It is trite law that in an action for negligence the plaintiff has to prove that the defendant's act was the effective cause of the injury suffered by the plaintiff. Without a causative link being established by the plaintiff, the claim cannot succeed. The passage found in para 2-01 of the text of *Clerk & Lindsell on Tort* (20th Ed), states this basic principle in the following manner:
>
> In the majority of torts the claimant must show that the defendant's wrongdoing caused him actual damage. In these torts, and indeed in tort actionable per se if substantial damages are sought, the claimant must establish that:
>
> (1) The defendant's conduct did in fact result in the damage of which he complains, and
>
> (2) The damage is not in law too remote a consequence of the defendant's wrongdoing.

And further:

[44] In this regard, the 'but for' test is important in determining whether or not the defendants'act was the main factor causing the damage suffered by the plaintiffs'. The text in para 2-09 in Clerk & Lindsell states that:

The first step in establishing a causation is to eliminate irrelevant causes, and this is the purpose of the 'but for' test. The courts are concerned, not to identify all of the possible causes of the particular incident, but with *the effective cause of the resulting damage in order to assign responsibility to that damage.* The 'but for' test asks: would the damage of which the claimant complains have occurred 'but for' the negligence (or other wrongdoing) of the defendant? The first step in establishing a causation is to eliminate irrelevant causes, and this is the purpose of the 'but for' test. The courts are concerned, not to identify all of the possible causes of the particular incident, but with the effective cause of the resulting damage in order to assign responsibility to that damage. *The 'but for' test asks: would the damage of which the claimant complains have occurred 'but for' the negligence (or other wrongdoing) of the defendant?*

(Emphasis added.)

[102] Applying the 'but for' test in the particular circumstances of this case, the direct cause of the loss suffered by the bank was the firm's lapse or failure to comply with the specific instruction of the bank, to carry out searches on the developer and/or liaise with the developer's solicitors. I agreed with the submissions of counsel for the bank and the conclusion arrived by the trial judge that if those specific instructions in the retainer had been dutifully attended to by the firm, the 'fraud' that was hatched as between Metro Development and Pneh (whoever he was) would have been detected and would have come to the fore to prevent the loss now occasioned to the bank.

[103] The fact that such a 'fraud' was likely to be perpetrated on the bank was, in my further assessment, not a 'fantastic possibility' (to borrow a phrase from Gopal Sri Ram FCJ in *Chang Siew Lan (f) v Loh Chooi Teng (practising as Messrs CT Loh & co a firm)* [2009] 6 MLJ 776; [2010] 1 CLJ 657) or an event of such extra ordinary nature that could be ruled out outright.

[104] Given that there was an open opportunity to make some easy money such a 'fraud' being perpetrated was a very 'likely possibility' and one that was not remote, in any event. It was against such risk that the services of a legal firm, like the firm here, was retained by the bank with the specific instructions to do the search and liaise with relevant parties as already adverted to above and thereby to be alerted should there be any hint of impropriety.

[105] The 'fraud' perpetrated by Metro Development, Pneh and Messrs KY Lee & Associates were also not 'supervening factors', in the sense, that they arose after the bank's instructions had been issued and/or the firm had acted on them faithfully. They were, it must be stressed, here pre-existent and could have

A been detected if the firm had complied with the bank's specific instruction, notwithstanding they might be considered 'extraneous' factors in so far as the parties were concerned.

B **[106]** Further, the contention of the firm that the bank's claim was not actionable on account of the principle of law behind the maxim 'volunti non fit injuria' (that to which a man consents cannot be considered as injury) was of no merit in the circumstances. The only waiver assented to by the bank in this case was as to the need to lodge a private caveat, but as pointed out the loss or injury C was directly attributable to the 'fraud' which could have been detected of the firm, if the firm had carried out the instructions of the bank. The bank did not expressly or impliedly assume this risk nor did it agree to absolve the firm in the event of such an eventuality taking place.

D **[107]** For completeness, I should also state that the judgments or observations of the courts in:

(a) *Chang Siew Lan (f) v Loh Chooi Teng (practising as Messrs CT Loh & co a firm)* [2009] 6 MLJ 776; [2010] 1 CLJ 657;

E

(b) *Wong Kiung Hung & Anor v Chang Siew Lan (f)* [2009] 4 MLJ 183; [2009] 3 CLJ 75; and

(c) *Chang Yun Thai & Ors v HSBC (M) Bhd & other appeals* [2011] 7 CLJ 909.

F

Cited by counsel for the firm in support of the firm's argument, were not relevant or applicable in the particular circumstances of this case. The issues in those cases all centered around the duties or extent of liability of solicitors acting pursuant to or administering the terms of sale and purchase agreements, G respectively in those cases.

In our case, the principal issue was, as highlighted earlier, whether there were specific instructions in the 'retainer' and whether the firm had acted thereon.

H SD1 ABSOLVED OF LIABILITY

[108] Counsel for the firm also argued that there arose a contradiction in the conclusion of the trial judge when SD1 was absolved of responsibility for the omission or lapses (as was argued) while the firm was on the other hand made I liable for the claims of the bank,

[109] What was stated by the trial judge in his grounds of judgment was as follows:

Dalam hal ini, Mahkamah mendapati bahawa isu tanggungan SD1 sebagai pihak yang bertanggungan tidak menjadi isu, malah pliding tidak menunjukkan isu sedemikian.

…

…

Semuanya tidak menunjukkan SD1 sebagai peguam yang menguruskan dokumentasi tersebut, tetapi semuanya atas nama firma Defendan sebagai sebuah firma guaman.

Dengan itu SD1 tidak boleh dipersalahkan. Sebaliknya Defendan sebagai rakan kongsi daiam firma Abbas & Ngan yang bertanggungan sepertimana yang diperuntukkan di bawah seksyen 11 Akta Perkongsian (Partnership Act) 1961.

[110] I did not find any inconsistency or contradiction in the trial judge's conclusions referred above. SD1 was not made a party to the proceedings by the bank and in any case she was an employee of the firm. The firm had chosen to leave the handling of this retainer wholly in the hands of a solicitor of limited one-year exposure to legal intricacies and conveyancing practice. The firm was ultimately liable for her acts and the statement 'Dengan itu SD1 tidak boleh dipersalahkan' taken in that context only meant that she should not be held personally liable to the bank.

THE CONCLUSION

[111] In *Lai Poh & Sons Sdn Bhd v Skrine & Co* [2001] MLJU 250; [2001] 3 CLJ 185, Mohd Noor Ahmad J (as His Lordship then was) had noted that the practice of conveyancing work required a high degree of skill and caution on the part of the solicitors for the purpose of protection of their clients' interest against possible fraud and forgery.

[112] It was trite that a client could bring an action against his solicitor in contract, based on the retainer or in tort, or in both. As regards the obligations arising out of the retainer, a solicitor's duty was to use reasonable care and skill as the facts of a particular case demanded and as instructed within the confines of the particular retainer.

[113] In this case the retainer issued by the bank expressly and specifically required the firm to make 'necessary searches' and to liaise with the developer's solicitors for further information and relevant documents including the original sale and purchase agreement from the developer. (see P23.)

[114] The omission or failure of the firm to do so and/or to act with

reasonable skill and care in the context of the instructions was the direct cause for the 'fraud' by Metro Development and Pneh to go undetected, to the detriment and loss of the bank.

[115] The trial judge was therefore not in error on the facts or in law in allowing the bank's claim against the firm.

I would therefore dismiss the appeal and order that costs be paid by the firm to the bank on this appeal.

Appeal allowed with costs.

Reported by Kohila Nesan